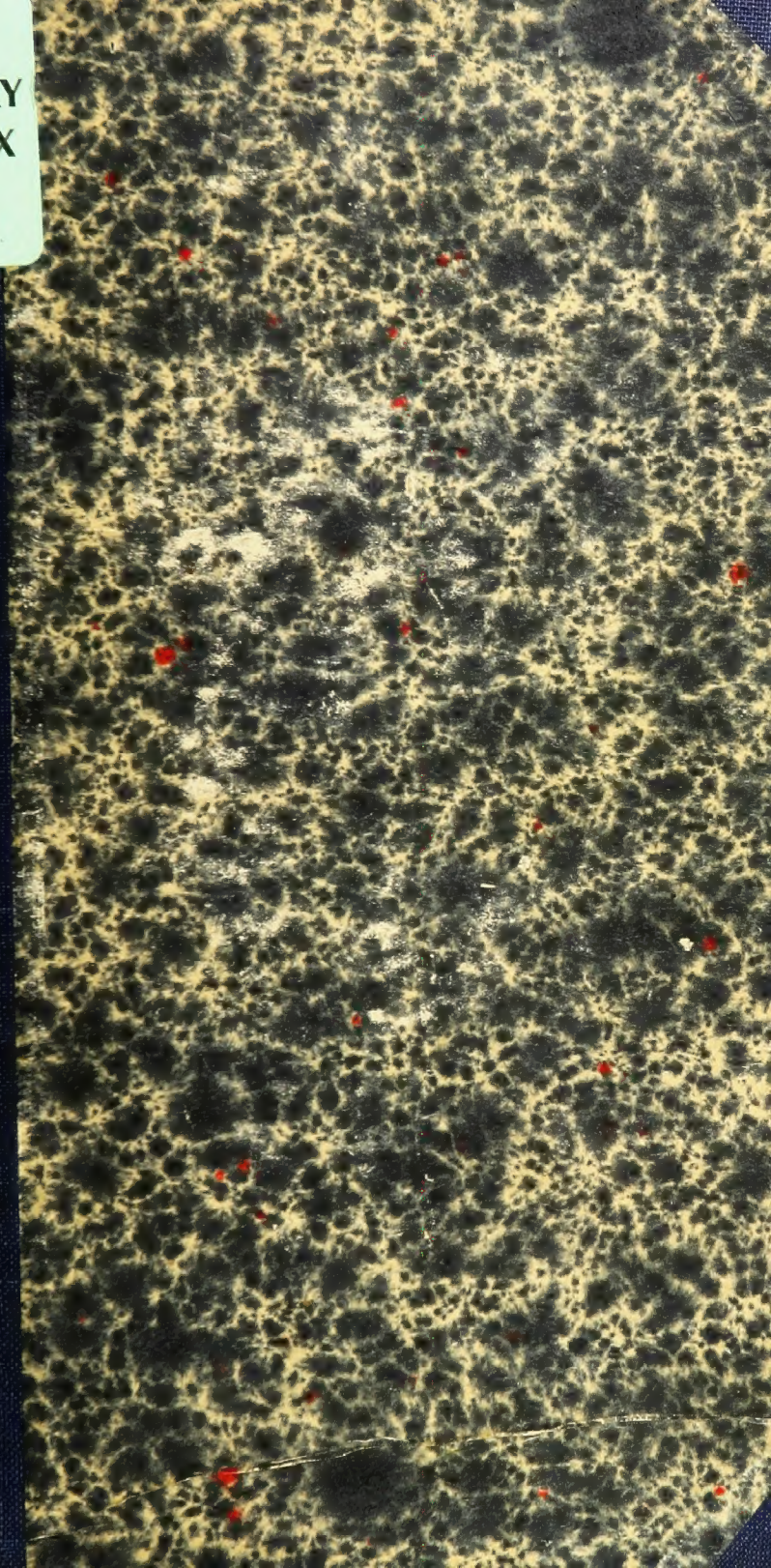
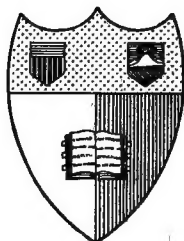


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THE BERLIN CONGRESS

By
HENRY F. MUNRO

This study is confined to the technique, procedure, and general conduct of the Berlin Congress. It presupposes knowledge of the questions discussed and of the settlements arrived at in the Treaty of Berlin

COMPLETED OCTOBER 14, 1918



WASHINGTON
GOVERNMENT PRINTING OFFICE
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THE BERLIN CONGRESS, 1878.

By comparison with the Congresses of Westphalia, Utrecht and Vienna, the Berlin Congress of 1878 was single in purpose and limited in scope. The earlier assemblies in each case marked the close of long, desolating wars, during which Europe had been ranged into two camps. Most European states, great and small, had representation and a complexity of questions, territorial, economic, and political, found more or less permanent solution.

The Congress of Berlin was quite otherwise. Its view was confined to the Eastern Question, so called, as it had been recently revived by the Balkan troubles and the Russo-Turkish War. Its announced purpose was the revision of the treaty of San Stefano of March 3, 1878, in the interest of the public law of Europe, especially as set forth in the treaty of Paris of 1856.¹ Its real purpose was to impose upon victorious Russia, on the demand of Great Britain and Austria, the mandate of the Powers that she retrench her conquests and spare the Ottoman Empire the *coup de grâce*. Germany, in the person of Bismarck, was the "broker" and received her commission in the definitive adoption by Austria of a policy of expansion in the Balkans and the consequent abandonment by her of any lingering desire to challenge the decisions of Sadowa and Sedan.² The Dual Alliance of 1879 was the visible sign that Germany had her reward.

PRELIMINARY AGREEMENTS.

Not only was the field of discussion limited but the discussion itself was in large part perfunctory.³ The

¹ "The stipulations of this treaty are in several points of a nature to modify the state of things as fixed by former European conventions, and it is for the purpose of submitting the work of San Stefano to the free discussion of the Cabinets signatories of the treatie, of 1856 and 1871 that we have assembled. Our object is to secure by common agreements and on the basis of new guarantees, that peace of which Europe so much stands in need"—Speech of Bismarck at opening session of the Congress, June 13, 1878. (Parliamentary Papers, 1878 [C. 2081], Correspondence respecting the Congress at Berlin, p. 12.)

² Motiy, *Souvenirs d'un diplomate* in *Revue des deux Mondes*, Oct. 15, 1904, p. 728.

³ A further restriction on the scope of the Congress was placed by France, for, in accepting the invitation to participate, M. Waddington stipulated that there should be no discussion of Egypt, Lebanon, or the Holy Places. See Motiy, *loc. cit.*, p. 729; Avril *Négociations relatives au traité de Berlin*, p. 280; Hanotaux, *Contemporary France*, IV, pp. 342-344.

decrees of the high assembly had been formulated in advance and the machinery of the Congress served but to register them.¹ A series of agreements between the interested powers, made in contemplation of the Russo-Turkish War or of the Congress, indicated the lines of settlement and left merely the details for the consideration of the plenipotentiaries at Berlin. The chief preliminary agreements were the following:

Reichstadt agreement.

Anglo-Russian convention.

Cyprus convention.

Anglo-Austrian agreement.

Preliminary understandings.

1. The Reichstadt Agreement, July 8, 1878, between Russia and Austria, supplemented by further agreements between the same powers, in January and April, 1877. These agreements formed the basis for the Austrian occupation of Bosnia and Herzegovina. Russia, in turn, stipulated for Bessarabia.²

2. The secret agreement between Great Britain and Russia, May 30, 1878. This made the Congress possible and virtually dictated the terms of settlement. All the points of the treaty of San Stefano were to be discussed.³

3. The Cyprus Convention, June 4, 1878, between Great Britain and Turkey. Russia, and probably Germany, were informed of this convention before the congress met.⁴

4. The secret agreement between Great Britain and Austria, June 6, 1878. (Sosnosky, op. cit., I, p. 170, citing Fournier, *Wie Wir zu Bosnien Kamen*, p. 63.) As a result of this, Great Britain supported Austrian occupation of Bosnia-Herzegovina.⁵

5. Pourparlers between Great Britain, Germany, and Austria resulting in a general understanding as to the policy to be pursued at the congress.⁶

INITIATION OF THE CONGRESS.

The months preceding the Congress were filled with political pronouncement and diplomatic exchange of which it is no part of this study to give even a résumé.⁷

¹ Larmeroux, *L'Autriche-Hongrie au Congrès de Berlin*, p. 86; Avril, op. cit., p. 266.

² Sosnosky, *Die Balkanpolitik Oesterreich-Ungarns*, I, pp. 151-152, 160-161; Larmeroux, op. cit., pp. 43-44, 60; Coolidge, *Origins of the Triple Alliance*, pp. 96, 113-114; Hanotaux, op. cit., IV, p. 361 (note).

³ Staatsarchiv, vol. 34, No. 6749. Avril, op. cit., pp. 345-346. Hohenlohe, *Memoirs* (Eng. tr.), p. 206; Rose, *Development of European Nations*, I, p. 278; Argyll, *Duke of The Eastern Question*, II, pp. 136, 144.

⁴ Cf. Müller, *Politische Geschichte der Gegenwart*, XII, p. 109. Caratheodory Pasha, however, one of the Turkish plenipotentiaries at the Congress, who himself was unaware of the convention until July 4, was of opinion that it was Austria and Germany that knew of it in advance. See Hanotaux, op. cit., IV, p. 375 (note). For the text of the Cyprus Convention, see Hertslet, *Map of Europe by Treaty*, IV, pp. 2722-2725.

⁵ "You will not forget the ancient alliance between Austria and this country, and the general coincidence of their interests. It is important that in the discussions of the congress on these matters you should support any legitimate proposals tending to benefit and strengthen the Austro-Hungarian monarchy. * * *" Lord Salisbury to Lord Odo Russell, June 8, 1878 (*British and Foreign State Papers*, LXIX, p. 833).

⁶ Motly, op. cit., p. 726.

⁷ For the diplomatic exchanges, see *British and Foreign State Papers*, LXIX, pp. 794-830. Cf. also Bismarck's Speech in the Reichstag, February 19, 1878, in Hahn, *Fürst Bismarck*, vol. 3, pp. 80-98. See also Hansard, *Parliamentary Debates*, 3d ser., vols. 237-240, *passim*; Müller, *Politische Geschichte der Gegenwart*, XII, pp. 78-79 (Andrassy's speech).

Suffice it to state that it was Austria which first proposed collective action in the suggestion, on February 5, 1878, that the Eastern Question be submitted to a conference of the powers signatory to the treaty of Paris of 1856 and the London Protocol of 1871. Vienna (later Baden) was indicated as the place of meeting. However, after the treaty of San Stefano had been signed, Austria, on March 7, substituted a proposal for a congress at Berlin to be attended by the Prime Ministers of the Great Powers.¹ This met with acceptance, especially after the Anglo-Russian agreement of May 30, and on June 3 formal invitations to the Congress were issued by the German Government, the powers consenting, so the invitation ran, "to admit the free discussion of the whole contents of the treaty of San Stefano." (Hertslet, op. cit., IV, p. 2721.)

A conference first proposed.

Germany issues the invitation.

REPRESENTATION AND PERSONNEL.

The congress held its sessions, twenty in all, at the Chancellor's palace in Berlin from June 13 to July 13, 1878. Accredited plenipotentiaries were present from the six Great Powers and from Turkey, being the signatory powers of the treaty of Paris of March 30, 1856. Representatives from other interested States were admitted on occasion for the purpose of laying their specific claims before the Congress, but took no part in its deliberations. For instance, at the ninth session (June 29) the Greek Foreign Minister and the Greek Minister at Berlin presented the views of their Government in matters affecting Greek interests and retired immediately thereafter, being informed that "the Congress, when it shall have studied the considerations presented by the Hellenic representatives, will communicate to them the result of their deliberations." (Parliamentary Papers, 1878 [C. 2083], Correspondence relating to the Congress of Berlin, p. 135). So also with the Roumanian representatives at the tenth, and the Persian Minister at the

Place and time of meeting.

Powers represented.

Occasional admission of other representatives.

Greece,

Roumania and Persia heard.

¹ "From the point of view of International Law there is no essential difference between congresses and conferences * * *. Congresses have usually been convoked for the negotiation of a peace between belligerent powers and the redistribution of territory which in most cases is one of the conditions of peace. At a congress, as a rule, more than two powers have been represented * * *. In the nineteenth century, congresses, properly so called, were held mostly at the capital of one of the powers concerned and then the Chancellor or Minister for Foreign Affairs presided. It will be found that on these occasions, besides the specially deputed plenipotentiaries, the local diplomatic representatives of the respective powers were also appointed." (Satow, Diplomatic Practice, II, pp. 1-2.)

Serbia and
Montenegro ex-
cluded.

fifteenth, session. (Ibid., pp. 151, 224.) Serbia, on the other hand, and Montenegro did not have even this limited measure of representation.

Secretaries
and technical per-
sonnel.

Twenty representatives in all participated, three from each of the powers invited, save Italy, which sent only two. The leading powers designated as first plenipotentiaries their most prominent statesmen—Bismarck, Disraeli, Gortchakoff, Andrassy.¹ Included in the list were the foreign ministers of most of the Governments participating, as well as all their respective ambassadors accredited to the court of Berlin.² Each mission was surrounded with a personnel of secretaries, diplomats, technical functionaries, experts, and military advisers. On the Austrian staff, for example, in addition to the three plenipotentiaries, were Baron Schwegel, chief of the commercial and consular section in the Ministry of

¹ "Who would be the men to represent the powers at this congress? As a rule it was the business of the diplomatic circles. But this time Bismarck was presiding, the ministers would therefore wish to figure in it. Lord Beaconsfield sought therein the apotheosis of his brilliant career. * * * It was not without lively criticism that his resolve to attend the congress was made known, even from the ranks of Conservatives—

"From the constitutional point of view, it is rather despotism; from the standpoint of tradition, it is without precedent. * * * Lord Beaconsfield in the House of Lords took a lofty tone about it, announcing that he assumed the whole responsibility of this step which was taken at the request of his colleagues." (Memorial Diplomatique, 1878, p. 378)." Hanotaux, Contemporary France, IV, p. 339.

The appointment of Gortchakoff was due to his own personal insistence. Schouvaloff, whom Gortchakoff supplanted as First Plenipotentiary, has this to say of it:

"This is a further proof of how much is sacrificed with us to personal considerations. The Emperor knew that Prince Gortchakoff had no personal weight; he knew the strong feeling that Prince Bismarck harboured against the Russian Chancellor; his presence in Berlin could only be harmful to our cause. All this was quite palpable, and yet, in spite of everything, Prince Gortchakoff was authorized to come to Berlin." Cited in Hanotaux, op. cit., IV, p. 340.

Hohenlohe was of opinion that Bismarck chose him, "in order to be able to say to the King of Bavaria that, out of consideration for his Majesty, they had taken his Majesty's Kronoberstkämmerer (Lord High Chamberlain)." Hohenlohe, Memoirs, II, p. 207.

² The complete list of the plenipotentiaries is as follows:

"For Germany, Prince Bismarck, Chancellor; Herr von Bülow, Secretary of State in the Department of Foreign Affairs; Prince Hohenlohe-Schillingfurst, Ambassador Extraordinary and Plenipotentiary at Paris.

"For Austria, Count Andrassy, Minister of the Imperial Household and of Foreign Affairs; Count Karolyi, Ambassador Extraordinary and Plenipotentiary at Berlin; Baron Haymerle, Ambassador Extraordinary and Plenipotentiary at Rome.

"For France, M. Waddington, Secretary of State in the Department of Foreign Affairs; Count de Saint-Vallier, Ambassador Extraordinary and Plenipotentiary at Berlin; Mons. Desprez, Director of Political Affairs at the French Foreign Office.

"For Great Britain, Lord Beaconsfield, Prime Minister; Marquis of Salisbury, Secretary of State for Foreign Affairs; Lord Odo Russell, Ambassador Extraordinary and Plenipotentiary at Berlin.

"For Italy, Count Corti, Minister for Foreign Affairs; Count de Launay, Ambassador Extraordinary and Plenipotentiary at Berlin.

"For Russia, Prince Gortchakoff, Chancellor; Count Peter Schouvaloff, Ambassador Extraordinary and Plenipotentiary in London; Mons. d'Oubril, Ambassador Extraordinary and Plenipotentiary at Berlin.

"For Turkey, Carathéodory Pasha, Minister of Public Works; Mehemed Ali, General; Sadoullah Bey, Ambassador Extraordinary and Plenipotentiary at Berlin." (Sotow Diplomatic Practice, II, pp. 90-91.)

Foreign Affairs, Conseiller de Legation Kosiek, First, Interpreter of the Austrian Embassy in Constantinople, Minister Plenipotentiary von Teschenberg, Conseiller de Legation Baron Hübner, Hofrath Doczy, Private Secretary von Pichy, and several others. (The Times, June 5, 1878.) The British mission included some 40 officials of the foreign office, besides military and other advisers appointed *ad hoc*.¹

BISMARCK CHOSEN PRESIDENT.

The choice of Berlin as the place of meeting implied, *ipso facto*, that Bismarck would preside over its deliberations, and this quite apart from political considerations. At Vienna (1815), Paris (1856), and London (1871), it had been established that the presidency of such high assembly should vest in the representative of the sovereign whose hospitality it enjoyed. Accordingly, at the opening session on June 13, after Bismarck had proposed that the Congress proceed to elect its officials, Andrassy, having previously consulted with the other plenipotentiaries, nominated the German Chancellor as president. There was unanimous agreement in his election to the august office.²

Precedent at
congresses.

Andrassy nom-
inates Bismarck.

RULES OF PRECEDENCE, ETC.

In details of diplomatic etiquette, the Berlin Congress was free from those humorously petty, but mock-important, incidents that characterized the proceedings of congresses in the seventeenth and the eighteenth centuries. Seating arrangements were in accordance with the rules of diplomatic practice, as were also all matters

Seating arrange-
ments.

¹ For a list of the personnel deputed to take part in the work of the Congress, see The Times, June 13 and 14, 1878 (infra. Appendix I). See also Motiv in Revue des deux Mondes, Oct. 15, 1904, pp. 739-740.

As at all Congresses, numerous persons were present, officially and otherwise, to urge various claims. De Blowitz, the famous correspondent, writes thus of them:

"The Congress * * * has also favoured us with an influx of professional gentlemen ready to assist in the labours of the meeting. Of these, some have been officially called in to give guidance, others are deputed to advise or petition; others still are watching the proceedings in the interest of commerce, religion, or race. Civil and military agents of all European Powers have flocked hither from all parts of the East. Greek, Servian, Roumanian, Armenian, Albanian, Bulgarian, Turkish and Jewish claimants, like so many minor planets, busily revolve round the greater lights of the diplomatic and consular service." The Times, June 20, 1878.

² For the precedents governing the choice, see the statement of Lord Derby in the debate in the House of Lords, March 11, 1878. (Hansard, Parliamentary Debates, 3d ser., vol. 238, pp. 1036-1041). Infra, Appendix II.

Signatures.
Language.

of precedence in signatures and otherwise.¹ French was the language of the Congress, although Bismarck professed some diffidence in its use.² According to Hohenlohe, uniform was worn at the opening session in conformity with Lord Beaconsfield's wish.

Uniform.

PRELIMINARY ORGANIZATION.

The Secretariat.

Bismarck, anticipating the functions of his office, was ready with an organized secretariat, at the head of which The Secretariat was M. de Radowitz, German Minister to Greece. His chief colleague was M. le Comte de Moüy, First Secretary of the French Embassy at Berlin; and to assist them Bismarck had designated four functionaries of the German Foreign Office—M. Busch, Baron Holstein, Count Herbert Bismarck and M. Bücher, the latter the "secretarial archivist." The work of the secretariat and its division of labor have been thus described by de Moüy:

Its duties.

"The editorship of the protocols was put in my charge * * * Unquestionably I had to come to an agreement with M. de Radowitz for the exact reproduction of the debates, but without my being subordinate to him; and each protocol, edited entirely by myself, was submitted only to the authority of the Congress. I must add that my colleague and I were always in perfect accord. He prepared the orders of the day, watched over the division of the work, elaborated the notes necessary to clarify the discussions, reread the projected protocols with me, and above all, under the direction of the president, was in constant, and often confidential communication with the plenipotentiaries. My task, far less complex, did not, however, cease being troublesome, since I had to concentrate the discussions, which were often long and confused, into brief and clear form, without weakening or exaggerating the thoughts of the orators, but it was a

¹ For the rules of precedence, see Satow, *Diplomatic Practice*, I, pp. 351-353; II, pp. 182-183.

"In what was formerly the great hall room a green table, shaped like a horseshoe, had been placed. In the middle the president's seat; on either side France, left: Austria, right; then England next to Austria, Italy to France; further down Russia on the right, Turkey on the left. Opposite Bismarck sits Radowitz as recorder; I [Hohenlohe] on the left, Bülow on the right." Hohenlohe, *op. cit.* II, p. 207.

² "The Imperial Chancellor accompanied me into another room, and spoke again of the difficulty which was caused him, by presiding in French. He had, however, done extremely well, and no one had noticed the embarrassment which he professed to have felt." Hohenlohe, *Memoirs*, II, p. 210.

While the use of French was official, other languages were employed by the plenipotentiaries. For example, at the opening session Lord Beaconsfield "made a long speech in English, very clear and emphatic." *Ibid.*, II, p. 208.

very definite task, and I did not have to concern myself in any way with the business reserved to the chief of the secretariat and to the assistants designated to him by the Chancellor." (*Revue des deux Mondes*, Oct. 15, 1904, pp. 735-736.)

In addition to its routine duties, the secretariat was commissioned by the president to collect and submit for examination the documents and full powers from which the plenipotentiaries derived their competence. These were presented the first day (with the exception of those of the Turkish representatives, two of whom had not yet arrived), and found to be in good and due form. The Ottoman plenipotentiaries presented their full powers at the next session.

Full powers.

PROTOCOLS.¹

At the first session Bismarck made the suggestion, which met with the approval of the members, that "all propositions and documents destined to appear in the protocol should be drawn up in writing and read by those members of the congress who initiate them."² When drawn up, the protocols were promptly printed and distributed among the plenipotentiaries and, in conformity with the suggestion of Bismarck, this distribution was substituted for the customary reading, at each session, of the protocol recording the minutes of the previous session, except that of the first day's proceedings, which was duly read. If no change was suggested by anyone, the text was considered as approved. It was understood, of course, that any member could request the reading of the entire protocol.³

Protocols not read.

¹ "During a congress or a conference, no matter for what object or purpose, the minutes of meetings of the plenipotentiaries are styled either protocol or *proces-verbal* indifferently. Perhaps the former word is the more dignified." Satow, *Diplomatic Practice* II, p. 236.

² *Parliamentary Papers*, 1878, (38) Correspondence relating to the Congress of Berlin with the Protocols of the Congress, Turkey, No. 39 (1878) [C. 2083], p. 12 (Hereafter cited as Protocols). For the protocols, see also *British and Foreign State Papers*, Vol. LXIX, pp. 862-1078.

³ Hanotaux quotes the Turkish First Plenipotentiary as follows:

"The official protocols give a faithful report of the work of the congress, and an official summary of it, but beneath the diplomatic envelope which uniformly covers all the parts, it is hard to find the true aspect of the details. Further, also, the protocols were not reread during the meetings and very important modifications were permitted to be introduced into them." (Unpublished *Memoirs of Carathéodory Pasha*.) *Contemporary France*, IV, p. 346 (note).

PETITIONS.

Various petitions and documents "of very disproportionate importance" were addressed to the Congress or the President. Bismarck instructed the secretariat to make a selection of such as were of political interest, summarize them and distribute the lists to the members of the Congress. In principle, no proposals or documents were submitted to the Congress unless introduced by one of the plenipotentiaries and by this rule the reception of petitions was governed. Anonymous petitions were not included in the lists in any case but were placed on file at the secretary's office.¹

GENERAL PROCEDURE.

In the course of the early exchanges over the proposed conference, Germany had suggested "a preliminary conference of second plenipotentiaries or, better still, of their representatives accredited here [Berlin] in order to make preparation in regard to matter and form for the deliberations of the Conference."² Such does not appear to have been instituted in anticipation of the Berlin Congress. According to the Vienna correspondent of *The Times*, however, the German Government had prepared for the consideration of the plenipotentiaries a form of procedure based on the rules followed at the Congress of Paris in 1856.³ But Bismarck made no reference to the Paris rules in his remarks on procedure at the opening session, nor do the protocols furnish any information on the point. In his observations on assuming the office of president, he proposed that the questions arising out of the treaty of San Stefano should be classified and discussed in the order of their importance. On this view of it, Bulgaria, its delimitation and future organization, called for first consideration and the secretariat was instructed to prepare the orders of the day accordingly. Further, Bismarck thought it advis-

¹ Protocols, pp. 22, 34.

² Memorandum from Berlin, March 15, 1878. British and Foreign State Papers, vol. LXIX, p. 802.

³ "A project to this effect [for regulating the proceedings] based on the rules observed at the Paris Conference of 1856, has been prepared by the German Government and communicated to the plenipotentiaries, so as to give them time and opportunity to study it and consult about any amendments deemed desirable before the subject comes on in to-morrow's sitting. It is thought probable, too, that the project will be accepted, such as it is, with the addition of some provisions concerning the formal sanction of resolutions to be passed." *The Times*, June 12, 1878.

able to have an interval of some days before the second session "in order to give time to the plenipotentiaries to exchange their ideas." Finally, he did not doubt that the plenipotentiaries would "be unanimous as to the necessity of preserving the secrecy of their deliberations."¹

Secrecy.

The order of the day was under the general supervision of the president, who, usually with the assent, and occasionally with the suggestions, of the members, directed the secretariat in the formulation of the subjects for discussion.² Sometimes the Congress collaborated more directly, as at the session of July 2, when, on the exhaustion of the order of the day, it proceeded, on the proposition of Count de Saint Vallier, to make arrangements for the next session.³ To expedite business, it was agreed at the opening sitting that members intending to make new proposals should give notice of such intention at a previous meeting, so that all could be prepared for the discussion, "proposals connected with questions on the order of the day and resulting from the discussion itself to be excepted." Lord Salisbury understood this to apply "only to substantive proposals and not to amendments or secondary questions."⁴

Order of the day.

At the fifth session (June 24) it was emphasized by Bismarck, with the approval of the plenipotentiaries, that only the questions of general European interest should engage the attention of the Congress, in contra-

Only questions of European concern discussed.

¹ Protocols, pp. 12-13.

It is unnecessary to add that Europe was kept fully and accurately informed of each day's proceedings through *The Times* and other journals. De Blowitz, the famous correspondent of *The Times*, was intimate with some of the plenipotentiaries, notably with Hohenlohe, and was even employed, unofficially, by Bismarck as a mediator in the Anglo-Russian differences.

"July 2. Home at 5 o'clock. Then at 6 I fetched Blowitz to drive with him to dinner with the Imperial Chancellor. Blowitz was delighted. The Chancellor worked on him in the interests of the Russian claim to Batoum." Hohenlohe, *Memoirs*, II, p. 219.

² The lack of fixed plan made all arrangements at the Congress more or less unstable. This is illustrated by Hohenlohe's account of how a prospectus of points remaining for discussion, which he was having specially prepared at Bismarck's request, was superseded by an outline of Andrassy's that came to the eye of the chancellor.

"This is what happened," says Hohenlohe. "This morning I went to Bülow, who talked once more with me on the subject and said he had commissioned Jasmund to make the résumé. I then proceeded to see Jasmund, who was ready to work out a complete memorandum * * *. I then went to Waddington, told him of the affair, and met with his complete approval. At 1.30 to the congress hall. Schuwaloff laid hold of me and said he already knew of the matter and agreed with it * * *. Then Andrassy came up, who also knew of it. He had already drawn up a plan, and wrote it down for me * * *. The Imperial Chancellor soon came up, and I showed him this sketch. He looked it through and approved it. We then went on to the sitting. Before the conclusion the Chancellor asked for my note, which I handed him. He then proposed that the discussion should follow in order, on the basis of this note. Everyone agreed and Jasmund's work is superfluous." *Memoirs*, II, p. 216.

³ Protocols, p. 172.

⁴ *Ibid.*, pp. 14-15.

Minor questions reserved for private interviews.

distinction to those affecting only Russia and Turkey. Questions not of an urgent nature were reserved for "private interviews between the powers which take special interest in them." Thus the new treaty which should embody the work of the Congress was to concern itself merely with the disputed stipulations of the Treaty of San Stefano.¹

PROCEDURE ON A GIVEN QUESTION.

Interchange of ideas.

First and second readings.

Private meetings between the plenipotentiaries to settle details.

First reading determines principles.

Second reading establishes the text.

The actual method of considering specific questions was indicated in the course of the second session. The British proposal with respect to Bulgaria having been presented by Lord Salisbury, and it appearing that more detailed information was desirable, it was suggested by Bismarck that discussion on the question be adjourned and that meanwhile the interested cabinets try to reach agreement upon as many points as possible. After the results of this interchange of ideas had been submitted to the Congress, "it would then be the task of the Congress, should the agreement not be fully established, to endeavor to complete it by means of the intervention of the friendly powers."² Count Andrassy having expressed himself as "ready to take part according to parliamentary rules in a general discussion, to be followed by a special discussion," Bismarck agreed, adding that it would be advisable to have a first and a second reading in each case: "The first should take the place of the general discussion, the second would give opportunity for entering into details."³ He considered that "private and intimate meetings between the representatives of the powers directly interested"—meetings which he recommended without assuming the right to convoke them—"would possess the great advantage of better preparing the ground for an understanding on questions of detail and wording. The chief point for the full meetings of the Congress would be to establish an agreement on questions of principle; when these questions shall have been settled, the method of proceeding will be on the second reading to draw up a text destined to replace the articles of the Treaty of San Stefano."³

¹ Protocols, p. 66.

² Protocols, p. 25.

³ Ibid. "In conformity with this mode of proceeding, proposed by the president, the plenipotentiaries of Austria-Hungary, Great Britain, and Russia agree to interchange their views in private meetings with the object of determining the points of agreement and consequently of facilitating the work of the Congress. They will communicate the result of these interviews to their colleagues." Ibid.

At the next session (June 25) Bismarck found it necessary to admonish the Congress on its tendency to consider questions beyond its scope. "His Serene Highness, recurring to a view which he has already had occasion to express, does not think it expedient to discuss secondary questions in the Congress. He regards, for example, that on which they are at present engaged as coming within this category, and he thinks that in raising this question of the assembly of notables, of a Russian commission, and of a European commission, the Congress exceeds the limits assigned for its deliberations; he can not see that this discussion of details is a matter of European interest. * * * Prince Bismarck adds that he would be disposed to put aside the question of Bulgaria so soon as a thorough understanding shall have been arrived at on the essential principles, and then to take into consideration immediately the other most important points of the treaty of San Stefano. * * * He intends to propose at the next meeting that secondary questions shall merely be lightly touched on, and that only objects of a veritable European interest shall be discussed at length.¹ The president has, however, no desire to prejudice the opinions of his colleagues, and the opinion which he has just expressed is an entirely personal one." (Protocols, p. 79.)

In spite of these arrangements, however, the discussion of the Bulgarian question concerned itself with an excess of details. Accordingly, on its conclusion, Bismarck again reminded the plenipotentiaries that the Congress could "only lay down the bases and leave the details to be elaborated by an assembly to be convoked later on, and which would terminate the examination of secondary questions."²

Congress concerned only with general principles.

VOTING.

In the course of his remarks at the first session Bismarck considered it "incontestable that the minority in the Congress shall not be bound to acquiesce in a vote of the majority." But he suggested that resolutions taken by majority vote on minor points should have validity as decisions of the Congress, provided that no

Only an unanimous vote binding.

Majority vote on minor points.

¹ The proposal recorded in the protocol of the next session (June 26) as coming from Bismarck was one constituting a Drafting Committee, "charged with the preparation of a draft of all the stipulations to be inserted in the new treaty, taking into consideration the resolutions recorded in the protocols of the Congress." (Protocols, p. 89.)

² Protocols, p. 94.

formal protest had been entered by the minority.¹ Schouvaloff, at a later sitting, invoked the principle "according to which the congress is not bound by a majority but only by the unanimity of its members."²

Parliamentary
procedure re-
versed.

Motion put
first.

Question lost
on equality of
votes.

In putting the question, parliamentary procedure was reversed. For instance, at the third session, when two proposals with reference to the admission of representatives from Greece were before it, the Congress voted first on the main question—the French proposal—as establishing the general principle, and then on the British amendment, the first vote being "considered as conditional—that is to say, as subject to amendment in conformity with the English proposition—should the latter be adopted."³ In this case the votes on the amendment were divided equally, Bismarck voting against it as a representative of Germany.⁴ It was consequently declared lost and the French proposal adopted.

Provision for
subsequent
changes in de-
tails.

On occasion, the general principle was approved but provision made for subsequent amendment as to details. For example, at the session of June 22, the Congress accepted the British proposal concerning Bulgaria but reserved the power to introduce into the text of the treaty certain changes of detail which the parties specially interested should agree upon in private discussions. In this instance, M. Waddington was charged with the task of preparing a draft which should reconcile the British proposals with the Russian amendments. Schouvaloff, while agreeing, subordinated his assent "to the right of reverting subsequently to his amendments, for if they were rejected, he must in the first instance refer to his government."⁵ On a later occasion (June 25),

Questions taken
ad referendum.
Protocol left
open.

Schouvaloff requested permission to take a question ad referendum, and, in consequence, the protocol remained open until such time as Russia's vote was received.⁶

¹ Protocols, p. 14.

² Ibid., p. 64.

³ Ibid., p. 36.

⁴ Bismarck acted at the Congress in a dual capacity. As president he guided its deliberations and continually intervened to reconcile divergent points of view. But as first plenipotentiary of Germany he presented the German position on various questions and often voted *ex parte*, especially when German diplomatic commitments required it. Thus, at the sitting on June 22 he stated that he could not, as German plenipotentiary, "remain entirely neutral" on the question then before the Congress (ibid., p. 49). He argued in support of the Austrian occupation of Bosnia-Herzegovina (ibid., p. 115) and of the cession of Bessarabia to Russia (p. 138). While opposed as German representative to the reception of the Roumanian delegates, "he wished to subordinate his vote to that of the powers more particularly interested" and gave his consent accordingly (ibid., p. 135).

⁵ Ibid., p. 50.

⁶ Ibid., pp. 77, 112.

The Turkish plenipotentiaries repeatedly referred to their government for instructions on given questions. Ibid., pp. 171, 183, 211, 231.

WORKING ORGANIZATION—COMMITTEES.

The actual decisions of the congress were taken through one or other of the following channels:

1. Plenary meetings of the Congress.
2. Preliminary discussions (*pourparlers*) and private agreements among the plenipotentiaries of interested powers.
3. Mediation of "neutral" powers.
4. The Boundary Committee.
5. Military Commissions.
6. The Drafting Committee.

1. PLENARY SESSIONS.

In general, Bismarck adhered closely to his position, early taken, that "the chief point for the full meetings of the Congress would be to establish an agreement on questions of principle," leaving details, if coming within the purview of the Congress, to be arranged by other means.¹ Accordingly, the Congress, under the watchful eye of its president, gave its attention to the broad lines of settlement, carefully relegating secondary questions to committees or to private interviews. If necessary, of course, the Congress in plenary session took final review of all work done by the committees, which implied that it had to concern itself to some extent with details.² Thus, at the sitting of July 6, we find the Congress giving diligent study (and the need was great) to a map, submitted by Schouvaloff, on which were indicated the lines of the Russian concessions in Asia. (Protocols, p. 209.) But as a rule, minor questions were avoided. This ruling of Bismarck, strictly adhered to, enabled him to expedite business and to avoid the danger, always latent, of open disagreement, for the discussion could

Plenary sessions deal with questions of principle.

Secondary questions in committee. Final review by the congress.

Advantage of Bismarck's ruling.

¹ "The president thinks that the numerous details contemplated by the proposal just read are beyond the task of the Congress. The plenipotentiaries are assembled to accept, reject, or replace the articles of the treaty of San Stefano, but such a detailed development of a special point does not appear to him to come under the province of the High Assembly." Protocols, pp. 167-168.

"The President observes that it is not the business of the Congress to discuss these questions in full sitting, and the Congress decides upon referring the propositions of the first plenipotentiary of Turkey to the Drafting Committee." Ibid., p. 155.

² Prince Hohenlohe having inquired whether the Boundary Committee should submit its work to the Congress before transmitting it to the Drafting Committee, Count de St. Va'llier expresses an opinion, shared by the High Assembly, that the Congress should in the first place, approve the work of the Boundary Committee, which should be subsequently referred to the Drafting Committee so far as questions of form are concerned." Protocols, p. 156.

at any time, on the suggestion of the president, be adjourned for further consideration. It was this knowledge that a given question before the Congress either had been, or could be, settled behind closed doors, that gave its proceedings an artificial, predigested character, and afforded to the chief participants opportunity to indulge in the "high-sounding nothings" of full-dress oratory.¹

Proceedings artificial.

Sometimes, when positive discussion in plenary session was inexpedient, the Congress would take notice of motions, observations, or declarations, which otherwise would find no place either in the completed treaty or in the protocols.² It was thus that Salisbury and Schouvaloff had read into the record their respective declarations of policy with regard to the closing of the Turkish straits. (Protocols, pp. 270, 277.)

2. PRIVATE DISCUSSIONS AND AGREEMENTS

The key to the discussions of the Congress is to be found, as has been indicated, in the private meetings of the plenipotentiaries, especially those of Austria, Great Britain, and Russia.³ At the very first sitting Bismarck recommended an intermission of some days for an exchange of ideas, and later in the same session, when the question of the withdrawal of the Russian forces from the vicinity of Constantinople threatened an impasse, he made the specific suggestion that the question should first form the subject of direct discussion between the

Private meetings of Austrian, British, and Russian plenipotentiaries.

Withdrawal of forces discussed privately.

¹ See, for example, the speeches of Gortchakoff, Bismarck, and Beaconsfield in Protocols, pp. 89-90, 206-209.

² "M. de Launay confines himself to asking for the insertion of his motion in the protocol." *Ibid.*, p. 255.

"Count Corti * * * confines himself to requesting that his observations may be inserted in the protocol." *Ibid.*, p. 256.

³ "The great questions are in reality discussed and solved in the preliminary conferences, and when they are brought before the Congress formally constituted, the minor plenipotentiaries maintain a respective silence. Questions of secondary importance, on the contrary, are not so carefully prepared beforehand, and give the minor plenipotentiaries an opportunity of taking a more active part in the discussion."—The Times, July 5, 1878 (Berlin Correspondence).

"All Friday and Saturday the coryphées of the Congress devoted themselves to private interviews. Lord Beaconsfield conferred with Count Schouvaloff, Prince Bismarck, and Count Andrassy; Count Schouvaloff spent half a night in solitary conclave with his Vienna colleague, while Prince Bismarck likewise held special conference with the Russian and Austrian plenipotentiaries." *Ibid.*, June 17, 1878 (Berlin Correspondence).

"June 21. Negotiations all day between Schouvaloff, Bismarck, and Beaconsfield. Hope is entertained of some agreement, since the wording of the answer from St. Petersburg was favorable." Hohenlohe, *Memoirs*, II, p. 213.

Russian and British representatives. (Protocols, p. 14.)¹ Even the order in which the questions should be discussed seems to have been fixed by private arrangement among the plenipotentiaries.² The most difficult questions for adjustment came at the beginning and toward the end of the Congress—the questions of Bulgaria and Batoum. Over both the Congress was nigh a rupture, but the pourparlers of the interested plenipotentiaries, aided by the good offices of Bismarck, intervened to effect settlement.³ The Batoum question was rendered all the more

(1) "The Political Correspondence of this evening [June 14] publishes the following: 'The confidential pourparlers which have been carried on since the day before yesterday between the plenipotentiaries in Berlin relates to the question which has once more been mooted, of a simultaneous withdrawal of the British and Russian naval and military forces from the neighborhood of Constantinople. This question will be brought before the Congress on Monday if an understanding is effected in the interval.'" The Times, June 15, 1878, in telegram from Vienna.

(2) "The decision to be come to about the mode of proceeding [order of discussion of questions] may very likely in a great measure depend on the result of the confidential pourparlers going on within the last few days, and in the first instance, of course, on those between Count Andrassy, Lord Beaconsfield, and Count Schouvaloff, at first separately and later on between all three together * * * But although progress is reported, the impression is that things are as yet far from being near a conclusion; and this strengthens the belief that some time will be devoted to further private negotiations before the real business of the Congress begins. The pourparlers now going on between the three powers most closely interested are, in fact, but the continuation of those previously carried on in Vienna and London." The Times, June 17, 1878 (Vienna Correspondence).

"It appears that the confidential pourparlers have already led to an understanding about the mode of proceeding with the discussion of the treaty. The plenipotentiaries, it is said, have decided to avoid anything like a general consideration and enter at once in medias res * * * Bulgaria, with all connected with it, is to have priority of attention." Ibid., June 18, 1878 (Vienna Correspondence).

(3) The following excerpts from The Times correspondence will indicate the nature and the methods of the pourparlers on the Bulgarian question:

"All that can, therefore, be safely assumed, is that the Bulgarian question has formed the main subject of the recent confidential pourparlers and that it has made some progress." Ibid., June 18, 1878 (Vienna Correspondence).

"Yesterday's informal negotiations producing no result, the Bulgarian discussion in to-day's sitting of the Congress likewise left the situation unsolved. Private interviews will be resumed tomorrow." Ibid., June 20, 1878 (Berlin Correspondence).

"The plenipotentiaries of England, Russia, and Austria, in a conference held this evening at 5 o'clock, agreed to the following points, which will be submitted tomorrow to the Congress for ratification * * * Thus tomorrow's sitting will furnish the most delicate task of the Congress * * * A telegram from Constantinople constrained the Russians thus to settle these questions. At the same time this solution is equally due to the personal intervention of Prince Bismarck, who spoke with Lord Beaconsfield to-day." Ibid., June 22, 1878 (Berlin Correspondence).

"The Russian plenipotentiaries, in several official sittings, conferences, and interviews, declaring themselves unable to make the requisite concessions, Lord Beaconsfield at last gave them to understand that if to-day's sitting were allowed to pass without producing any result, he would probably deem it incumbent upon him to leave * * *. In the conference or at the social board, in lobby or at chance meetings in street and park, as often as the important subject was broached, Russian insinuating eloquence encountered the firm front of English resolve." Ibid., June 24, 1878 (Berlin Correspondence of June 22).

"To-day, before the public sitting, there was a long private interview between the plenipotentiaries of Russia, England, and Austria. In this interview, which was held at 11 o'clock, the last points which remained in suspense from the sitting of yesterday were settled, in order that the arrangements arrived at * * * might be laid before the Congress. Doubtless concessions have been made to Russia with which it would have been preferred to dispense." Ibid., June 24, 1878 (Berlin Correspondence).

Protocols reveal little of the negotiations.

Suspension of session.

Definite functions of the plenary congress.

delicate because of the unauthorized publication of the Anglo-Russian Convention of May 30, and it needed all the diplomatic resources of assembled Europe to prevent a break.¹ The protocols, however, in their official formality, reveal little of the atmosphere in which these negotiations were conducted, save that the appeals to the plenipotentiaries to discuss matters in private usually coincided with the periods of tension.² Occasionally, on questions of detail, the plenary session was suspended to permit of agreement by discussion between the representatives of interested powers—for instance, between the Austrians and Russians over the navigation of the Danube (Protocols, p. 186) and between the Russians and the British and Turkish over the demarcation of the Asiatic frontier (*ibid.*, pp. 276–277).

But even after the results of the *pourparlers* had been brought to the Congress, a residuum of discussion often remained, giving to the plenary assembly a definite function in the determination of issues. Details had to be settled and minor differences removed. The full Congress, too, gave the respective parties an opportunity to spar for more favorable positions than they may have happened to hold in the preliminary discussions, or, at the worst, to sound their diplomatic trumpets for the beating of a graceful retreat.³

3. MEDIATION OF "NEUTRAL" POWERS.

Germany, France, and Italy hold the balance.

The powers represented at the Berlin Congress were not equally interested in its adjustments. On most questions the vital interests of Austria, Great Britain, and Russia were directly affected, while Germany, France, and Italy held the balance and mediated in the

(1) Hanotaux, *Contemporary France*, IV, pp. 350–351.

(2) Thus Andrassy on the Batoum question:

"The first Plenipotentiary of Austria, calling to remembrance precedents which have led to good results, believes, with Lord Salisbury, that private interviews between the representatives of the two powers more specially interested might smooth difficulties which still oppose themselves to an understanding on which all his hopes are bent. His Excellency declared that he accepts beforehand the results of the discussion which will be carried on between the two powers." Protocols, p. 208.

The part played by these informal discussions, though many of them are unrecorded, is apparent from a perusal of the official proceedings. See Protocols, pp. 13, 14, 15, 25–26, 38, 46, 50, 66, 93, 151, 156, 183, 199, 207, 208, 209, 225, 238, 277.

In such a discussion in full Congress each side in turn may expect to be more favorably situated than in the preliminary conference, * * * as it may chance to carry its point by the support of the other powers who * * * took no active part in them * * *. But even as regards those points about which the preliminary conferences have led to some sort of understanding, it was hardly to be supposed that no effort should be at least made in the full sitting of the Congress to defend them, and, with respect to Russia especially, some defense on the stipulations of San Stefano has to be made, at least for form's sake. *The Times*, June 19, 1878 (Vienna correspondence.)

disputes.¹ The rôle of the "neutral" powers was thus set forth by Bismarck at the session of June 26: "The states less directly interested in the questions which might trouble the peace of the world are naturally called upon to raise an impartial voice on every occasion when, ^{Their rôle as} for motives which appear of secondary importance in the eyes of Europe, the pacific object of the meetings of the Congress may be compromised. It is in this sense that France, Italy, and Germany would appeal, if necessary, to the wisdom of those of the friendly powers whose interests are more particularly engaged." (Protocols, p. 90.) ^{neutral powers.}

It has been already noticed (*supra*, p. 19) that M. ^{M. Waddington} Waddington was commissioned to draft an agreement ^{drafts compromise agreement.} between the British and the Russian positions, which task he accepted only "as a mission of conciliation." He succeeded, and Bismarck thought it right "in the name of the High Assembly to thank the French plenipotentiaries for the services which they have rendered to the cause of peace in facilitating an understanding by the text which they have just prepared." (*Ibid.*, pp. 50, 77.) At the session of June 25, in the matter of substituting European commissions for Russian commissions during the provisional administration of Bulgaria, Count Corti, "at the request of the Congress, consents to exam- ^{Italian representative} ^{repre-} ^{med-} ine, in concert with the representatives of the three powers more immediately interested, into the modifications to be introduced into the text of the treaty of San Stefano in the sense of Count Andrassy's proposition." As a result of the Italian mediation, the plenipotentiaries of the interested powers agreed upon a new draft. (*Ibid.*, pp. 79, 93.) Again, in questions relative to the Danube ^{Mediation re} Commission, with respect to which the Russian and the ^{Danube Commis-} ^{sion.} Austrian representatives offered divergent proposals, the Congress decided to utilize the mediation of a third power to bring the two texts into accord. For that purpose Baron de Haymerle and M. d'Oubril met the Count de Saint Vallier during a suspension of the sitting and agreed upon an arrangement satisfactory to both parties. (*Ibid.*, pp. 183, 186.)

¹ This, however, is true of Germany only in a qualified sense; for she, too, entered the Congress with a definite, though carefully concealed policy, however Bismarck might asseverate that she was "connected by no direct interests with the matters of the East." He saw to it that Austria secured a field for expansion and at the same time that Great Britain and Russia did not entirely compose their quarrel.

4. THE BOUNDARY COMMITTEE (COMMISSION DE DÉLIMITATION DES FRONTIÈRES).

Boundary questions prominent.

Membership of the committee.

Its functions.

Its relation to the military commission.

Its work as signed by Congress.

Committee asks for Bulgarian question.

Committee resembles the Congress in its deliberations.

As the work of the Congress advanced, it found itself more and more concerned with questions of boundary, and the need of a more expeditious method became apparent. Accordingly, at the the eighth session (June 28), on the proposal of Baron de Haymerle, it was resolved to institute a committee, consisting of one plenipotentiary for each power, to be charged "with formulating and submitting to the Congress a tracing of the frontier," the plenipotentiaries to indicate to the secretariat their choice of delegates. (Protocols, p. 121.) At the next session (June 29) the personnel of the committee was announced and thereafter, until the Congress rose, it was busy almost daily with various and often critical controversies over the delimitation of the boundaries.¹ It was its function to agree as far as possible on details and then to submit its work to the Congress for ratification.² It also directed the work of the Military Commission (see below) whose decisions in turn it usually adopted. From the plenary assembly its reports went to the Drafting Committee to be put into due form for the text of the treaty. While in general, the Congress indicated with what questions the Boundary Committee should deal, in one instance at least (the Bulgarian frontier) the Committee asked that the question, with all its details, be remitted to it for its consideration and decision, which request was complied with by the Congress. (Protocols, pp. 166, 167.)

The Boundary Committee, in its deliberations, naturally reflected the differences, and employed the methods, of the plenary Congress.³ It effected compromises, some-

¹ The boundary committee was as follows: For Germany, Prince Hohenlohe; for Austria, Baron de Haymerle; for France, Count de Saint Vallier; for Great Britain, Lord Odo Russell; for Italy, Count de Launay; for Russia, Count Schouvaloff; for Turkey, Mehemed Ali Pasha. (Protocols, p. 132). Hohenlohe was chairman.

² "The preliminary deliberations which commenced yesterday under the presidency of Prince Hohenlohe, and which are attended by one representative of each power, will continue to be held. Their object is to prepare the matters which are to come before the full sitting of the Congress, or to a certain extent to settle, as in committee, difficult points which at the full sittings, it would not be easy to dispose of without considerable delay. The arrangement is such that when certain matters have been referred to this committee, the full Congress will be able to continue its labors in regard to other questions, and subsequently take up those which have been submitted to the second plenipotentiaries under the presidency of Prince Hohenlohe." *The Times*, July 1, 1878.

³ The following excerpts will illustrate its methods and difficulties:

"July 1. Sitting of the Committee on the Servian frontier question where we came to no conclusion, since Mehemet Ali made difficulties." Hohenlohe, *Memoirs*, II, p. 219.

"July 4. The commission for the adjustment of the frontiers began its sittings at 12 o'clock yesterday. The Bulgarian frontier was first discussed, and the requisite

times with insufficient data, and was principally concerned with diplomatic settlements, even in defiance of racial or geographical considerations.¹ On occasion, the "neutral" members of the committee were responsible for its decisions, as in the matter of the Asiatic frontier, where the line, an intermediate one between the line asked for by the British and that offered by the Russians "had been adopted by an unanimous vote of the neutral powers." (Dispatch of Salisbury, July 10, 1878, Protocols, p. 213).²

Influence of neutral members.

Usually the reports (especially the majority reports) of the Boundary Committee became the subjects of further discussion in plenary Congress, and, agreement failing there, it once or twice became necessary to empower the Committee to settle a question of detail by majority vote without referring it back to the Congress or to special commissioners. In each case, however, when this was done by the Committee, its decision received the sanction of the full assembly. (Protocols, pp. 230, 239, 241, 251.) In one instance (re the valley of Alach-Kerd in Asia Minor) the Committee confessed that, in the absence of accurate knowledge as to the territory, it could not arrive at a decision, and referred the question to a special military commission to settle the dispute after the congress should rise. (Protocols, p. 269.)

Reports of committee considered by Congress.

Exceptional settlement of question by Committee.

Reference of question to special commission.

instructions were given to Lieut. Col. Blühme for deliberation in the commission of experts. The English difficulties then were mentioned. * * * Ibid.

"July 6. Yesterday at 12 o'clock Delimitation Commission. We made no progress, as the English plenipotentiary was not sufficiently instructed * * *. After the sitting I discussed the Balkan frontier further with Salisbury * * *. I then went to dine with Bülow, and explained to Schouvaloff, who dined there, too, a proposed method of adjusting the differences, which I had meantime thought out. Schouvaloff assented to it, but advised me to defer the proposal until the last moment * * *. At 9.30 there was a long sitting of the Commission, when we again drew up reports * * *." Ibid. p. 221.

"July 7. At the close of the day I * * * asked the Chancellor to put the Bulgarian frontier question on the order of the day for Monday, since I was reluctantly compelled to say that the Commission could not agree on the subject * * *. I replied that * * * the instructions of individual plenipotentiaries were defective. Odo Russell was naturally angry at this. He said nothing, but after the sitting declared he would take no further part in the sittings of the Commission. But he allowed himself afterwards to be pacified by Schouvaloff." Ibid., p. 222.

"After this sitting [of the Congress] the Delimitation Commission at once held its sitting, in order to smooth the differences of opinion between Gortcha'off and Reacousfield. After a long search we found a small piece which we could take away from the Russians; some mountain ridges, out of which we made a so-called *ligne de conciliation*, which was then accepted. None of us knew whether it was a sensible frontier." Hohenlohe, op. cit., II, p. 224.

² So, too, over the Sandjak of Sofia:

"The discussion became so warm at one of the last sittings of the commission that Germany, France, and Italy intervened and submitted a compromise boundary, which will probably be adopted by the Commission and Congress." The Times, July 5, 1878 (Berlin Correspondence).

5. MILITARY COMMISSIONS.

As military considerations were of paramount importance in the definition of the frontiers, the Boundary Committee of necessity had to rely for its technical decisions on the military experts attached to the various missions. Hence, many of the issues that divided the Congress were in fact carried over, through the Committee, to its military commissioners, and when these failed to effect settlement, the Committee would report no progress and the controversy have to seek other solution in plenary session.¹ Thus the military commissions played an important, sometimes a decisive part, in the final results and were responsible, in turn, for many of the differences that threatened more than once to render agreement impossible.²

6. THE DRAFTING COMMITTEE (COMMISSION DE RÉDACTION).

Function of the
Drafting Committee.

The proposal for a Drafting Committee was made by Bismarck, in the name of Germany, at the session of June 26. Its function was stated to be "the preparation of a draft of all the stipulations to be inserted in the new treaty, taking into consideration the resolutions recorded in the protocols of the Congress." The proposal was adopted, and the Committee was constituted before the next session (June 28).³ As the language of the treaty was to be French, it was natural that the chairman of the Committee should be the French representative, Desprez.

A French chairman.

¹ "Count Schouvaloff [speaking as a member of the Boundary Committee] recalls that the Congress, in one of its first sittings, admitted unanimously that the Sandjak of Sofia should be incorporated into the Principality of Bulgaria, subject to a strategic rectification of its frontiers. When the question was transmitted to the examination of the specialists of all the powers, they understood that it was a question of choosing between several crests those which could be best applicable to the conditions of defense. Such has not been the opinion of the English staff officers; they have asked to put back the frontiers behind the chain of mountains, and have, in this manner, converted a strategic rectification into a territorial cession." *Protocols*, p. 228. See also *The Times*, July 5 and 10, 1878.

² "July 8. * * * At 12 o'clock I found Lieutenant Colonel Blühme in the hall, and he told me that he had arranged nothing with the English general, and that in their special commission they had arrived at no conclusion." Hohenlohe, *op. cit.*, p. 221.

"July 10. A sitting of the commission on the morning of the 9th to make final settlements of the Servian frontier. We waited a long time for Lieutenant Colonel Blühme, who came at last and brought before us the proposed frontier of Servia. We accepted it by 5 votes to 2, as also the western frontier of Bulgaria." *Ibid.*, p. 224.

"July 10. * * * Delimitation Commission afterwards. We waited for the proposal of the military members, who again quarreled about the strategic position in the valley of Alach-Kerd * * *. Lieutenant Colonel Blühme arrived at last and made his report, whereupon we drew up a resolution." *Ibid.*, p. 225.

* The following were the members of the Drafting Committee: For Germany, Prince Hohenlohe; for Austria-Hungary, Baron Haymerle; for France, M. Desprez; for Great Britain, Lord Odo Russell; for Italy, Count de Launay; for Russia, M. d'Oubril; for Turkey, Carathéodory Pasha.

While its chief task was to agree upon a draft of articles previously debated, it sometimes had to consider, in connection with the work of drafting, questions which were passed on to it from the plenary Congress. Thus certain propositions relative to the Roumanian tribute were regarded as outside the business of the Congress and were referred to the Drafting Committee for suitable action. (Protocols, p. 155.) So also with the stipulations respecting the navigation of the Boiana. (Ibid., p. 157). Bismarck occasionally shelved proposals—mostly Turkish—which he did not wish to entertain, by referring them to the Drafting Committee, where they were usually not revived.¹ Although its work was more technical than deliberative, different points of view were sometimes developed in the Committee,² but when reported to the Congress they were not entertained, for Bismarck rigidly insisted upon “the inconvenience which would attend the modification of the resolutions adopted by the Congress and which have formed the basis for the labors of the Drafting Committee.”³

Bismarck uses the committee to shelve proposals.

Differences in committee not entertained in congress.

The Committee made its first report on the draft treaty at the session of July 9. Its plan followed the order of the discussion in the Congress and the reporter, M. Desprez, added that the treaties of Paris of March 30, 1856, and of London of March 13, 1871, were to be maintained “in all of their provisions, which are neither modified nor abrogated by the future treaty.” The

Treaties of Paris and London maintained.

¹ “The president states that the Ottoman plenipotentiaries will be able to support these observations later on before the Drafting Committee, to which the report of the Boundary Committee will be referred. * * *” Protocols, p. 183.

² “July 4. * * * Then at 2 the Report Commission met, which deliberated on the organization of Eastern Roumelia. Protests were raised by the Turkish ambassador, Caratheolory, against the proposal that the governor should be a Christian. But we did not go further into the subject. The negotiations were very tedious. We were not finished until 5 o'clock * * *” Hohenlohe, *Memoirs*, II, p. 220. See also Protocols, p. 255.

³ “July 12. * * * At 9 o'clock once more Report Commission, which lasted until 12 o'clock. I once more settled a threatening difference of opinion between Russians and English as to the frontiers in Asia.” Hohenlohe, *op. cit.*, II, p. 225.

³ Bismarck's ruling on this point was directed chiefly against Turkey. With others he was not so strict: *e. g.*—

“M. Desprez reads the section on Servia. With respect to the capitalization of the tribute of the principality, Prince Gortchakoff points out the importance of this question, on which the Russian plenipotentiaries would have objections to bring forward. Prince Hohenlohe, the Baron de Haymerle, and M. d'Oubril having announced, moreover, that they have reserve, in this respect, the votes of their Governments [in the Drafting Committee], the congress decides to place this question on the order of the day for the next sitting.” Protocols, p. 256.

“The president observes that an unanimous decision would be required in order to carry the compulsory redemption of the tribute * * *. His Serene Highness must therefore look upon the question as decided, and the Drafting Committee should suppress the article in its draft relative to the capitalization of Roumanian and Servian tributes.” Ibid., p. 268.

New treaty
takes precedence
over the old
treaties.

objection being raised by Salisbury that such qualification was not specific enough, especially with respect to the Straits, the discussion which followed indicated, in the opinion of the president, that the Congress gave its assent to the plan of the Drafting Committee and that the new treaty was to take precedence of the treaties of Paris, of London, and of San Stefano. (Protocols, p. 242.) At the subsequent sessions the work of the Committee was substantially adopted by the Congress without material change.

AGENCIES USED OR DEVISED.

Machinery used
to apply the
treaty.

The object of the Berlin Congress was to formulate a treaty. Many of its provisions, however, required other means of enforcement than the mere fiat of the high assembly. Some of the necessary instrumentalities were ready to hand; others had to be created. The following were the chief agencies employed:

1. EUROPEAN COMMISSIONS.

Bulgarian and
Roumelian Com-
missions.

Special duties
of the Roumelian
Commission.

These, two in number, were instituted under the treaty of Berlin, one to delimit the Bulgarian frontier (article 2), the other to organize Eastern Roumelia in concert with the Ottoman Porte (article 18). The Roumelian Commission was also to be consulted by the Porte with reference to the reforms promised for the other parts of European Turkey not specially organized under the treaty (article 23).¹

2. CONSULAR COMMISSION.

Consuls dele-
gated *ad hoc*.

Consuls of the signatory powers, together with a Turkish commissioner, were delegated *ad hoc* to assist the Russian commissioner in the provisional administration of Bulgaria. Their powers and methods of procedure were defined in article 6 of the treaty.

3. AMBASSADORIAL CONFERENCE AT CONSTANTINOPLE.

Various func-
tions assigned to
the ambassadors.

The diplomatic representatives of the signatory powers at Constantinople were invested with certain functions arising out of the treaty. They constituted the final appeal in case of disagreement between the Russian or

¹ The European Commission for the delimitation of Bulgaria was also to determine the frontier line of the Dobrudja cession to Roumania (article 46).

For references to European Commissions in the discussions of the Congress, see Protocols, pp. 47, 65, 67, 77, 94, 132, 227, 252, 271, 275.

Turkish commissioner in Bulgaria and the Consular delegates (article 6). They were to be informed of the occasions when it was necessary to summon Ottoman troops into Roumelia and were to fix the amount of the Ottoman public debt that Servia and Montenegro were to bear for the new territories assigned to them by the treaty of Berlin (articles 16, 33, 42).¹

4. THE DANUBE COMMISSION.

This had been created under the Treaty of Paris of 1856 and by the Treaty of Berlin was maintained in its functions and "all the treaties, arrangements, acts, and decisions relating to its rights, privileges, prerogatives and obligations" were confirmed (articles 53-56). All acts of Danube Commission confirmed.

5. FINANCIAL COMMISSION.

This was merely a recommendation, inserted in the protocol (No. 18) at the instance of Count Corti, that there be established at Constantinople a commission of specialists "charged to examine into the complaints of the bondholders of the Ottoman debt, and to propose the most efficacious means of satisfying them, as far as it is compatible with the financial situation of the Porte." Recommendation of Count Corti. (Protocols, p. 268.)

6. MEDIATION OF THE POWERS.

In the event of disagreement between Greece and Turkey over the rectification of their frontier, the signatory powers reserved "to themselves to offer their mediation to the two parties to facilitate negotiation." Right to mediate reserved. (Article 24.)

INFORMATION AND TECHNICAL APPARATUS.

In 1878, accurate information on the geographic, racial and social conditions of the Balkans was extremely meager. Little was known of the distribution of popu- Meager knowledge of Balkan conditions.

¹ At the session of July 11 the following draft resolution was unanimously agreed to by the Congress:

"The plenipotentiaries of the powers assembled in Congress at Berlin, moved by the reports which have reached some of them as to the present suffering of the population of the Rhodope and of the neighboring countries, are of opinion that it is desirable to instruct the Ambassadors at Constantinople to come to an agreement with the Sublime Porte for the immediate dispatch of a European Commission charged to verify on the spot the serious nature of the facts, and as far as possible to remedy them."

Bismarck, however, pointed out, with the assent of all, "that the members of the High Assembly, in agreeing to this resolution foreign to the subject of their deliberations, are acting, not as members of the Congress, but as representatives of their respective governments." (Protocols, p. 271.)

Maps inexact
and partisan.

Technical incapacity of plenipotentiaries.

Difficulties in
congress due to
inaccurate data.

The Lazes.

lations, and statistical and ethnographical data were so inexact that maps based upon them and submitted to support the respective contentions were characterized as "new instruments of diplomatic warfare," which did "more honor to the patriotic zeal than the scientific accuracy of those who construct them." (The Times, June 27, 1878. Berlin Correspondence.)¹ Added to lack of information was the incapacity of the chief plenipotentiaries to deal with questions calling for even elementary technical knowledge. Schouvaloff has affirmed that Gortchakoff "was incapable of pointing out on the map, even approximately, the different countries of the Balkan peninsula or * * * the position of Kars and Batoum," while Salisbury asserted that Beaconsfield had never seen a map of Asia Minor; and yet it was they who negotiated the agreement with respect to the Asiatic frontier.² This amazing ignorance of necessary geographical data, as Hohenlohe has recorded, affected even the Boundary Committee, though not to the same degree. (See *supra*, p. 31.)³

Difficulties repeatedly arose in plenary Congress from this source.⁴ During the controversy over Batoum, Gortchakoff estimated the Laze population of Lazistan at 50,000, the British and Turkish plenipotentiaries, at four times that number (Protocols, p. 209), which difference had to be reconciled in private interviews. When the Sandjak of Sofia was under final consideration, it was admitted that the map employed was not one upon which to base definite decisions.⁵ And during

¹ "The only sure practical conclusion which can be drawn * * * is that we have as yet very little trustworthy information concerning the population of the Balkan peninsula. This important fact has been fully recognized by the plenipotentiaries, and the Congress has thereby acquired a certain latitude in determining the frontiers of the various units of which Turkey in Europe is henceforth to be composed." The Times, June 27, 1878. (Berlin Correspondence.)

² Souvenirs of P. Schouvaloff quoted in Hanotaux, *Contemporary France*, IV, p. 353-354. The complete citation throws an interesting sidelight on the methods of negotiation at the congress. See Appendix III.

³ See also Protocols, p. 269.

⁴ "July 9. * * * In the case of Servia the Commission was not agreed. We had to bring the question before the full meeting. Some natural confusion resulted. The Chancellor and the meeting had no idea what the point at issue was, and however clearly I repeatedly explained the matter, the questions, when it came to voting, were not always clearly put. The Commission was finally instructed to deliberate once more on Branja, and once more to report progress." Hohenlohe, *Memoirs*, II, p. 223.

⁵ "The president is of opinion that it is dangerous to lay down in a treaty article a military route on ground which is little known and on a map the accuracy of which can not be relied upon. This delimitation might be inconvenient to those who may make use of it. His Serene Highness * * * is of the opinion that, in accordance with the decisions * * * taken by the Congress, the delimitation should be dealt with by negotiations on the spot." Protocols, p. 275.

an earlier discussion of this same question, the continued existence of the Congress was imperiled because of the discovery by the English plenipotentiaries that, through reliance upon an inaccurate map, they had conceded more than they had intended.¹

The best authority on the ethnography of the Balkans at the time appears to have been Kiepert, whose work in German, according to Avril, was "neither complete nor free from error."² For descriptive accounts of Bulgaria and Servia the works of Kanitz were available, and for the Dobrudja that of Peters, all in German. The best history of Bulgaria was by Jericek in Czechish, of which a German translation had been made. Among the statistical compendiums from various sources, the Vienna correspondence of *The Times* commends that of Teploff, a Russian, which seems to have been much relied on by Turkey in its case against the treaty of San Stefano (*The Times*, June 21, 1878).³ *The Times* also speaks of a recent ethnographical map edited by Carl Sax, the Austrian consul at Adrianople, and published by the Geographical Institute of Vienna as "a valuable addition to the data at the disposal of the Congress." This was a more scientific work than its predecessors and had taken into account not only local differences of race and religion, but also the amalgamations that had been effected between various elements (*The Times*, June 21, 1878). Whether or not it was used to any extent does not appear from the record.

Authorities:
Kiepert.

Kanitz.

Jericek.

Teploff.

Sax.

In defining boundaries in the Balkans the maps of the Austrian General staff were followed. (Treaty of Berlin, articles 2, 14, 28, 36.) A note appended to the draft treaty indicated that all the names of places had been

Austrian maps
used.

Russian maps
inaccurate.

¹ "July 4. * * * In the Congress Beaconsfield and Salisbury had agreed that Bulgaria should have the Sandschak of So'fa. They afterwards found that the Sandschak extends far beyond the spurs of the Balkan and that they had conceded too much. They now wish to take that back again, and were quite unabashed. Schouvaloff protested * * *." Hohenlohe, *Memoirs*, II, pp. 219-220.

² Avril, *Negociations relatives au traite de Berlin*, p. 318.

³ "The ethnographic information which we have (of Bulgaria) is not authentic; it is incomplete. The best, with which we are the least familiar, is supplied by German hands in the Kiepert maps * * *." Kohl, *Reden des Fürsten Bismarck*, VII, p. 83.

⁴ "The *Golos* of to-day publishes the French text received from Constantinople of the ethnographical protest of the Porte against the Bulgarian frontiers as fixed by the treaty of San Stefano. The *Golos* states that the document which will be submitted to the Congress by the Turkish plenipotentiaries is based upon Teploff's Russian statistical work upon Bulgaria, but points out that the statistics given by Teploff are incorrectly quoted by the compilers of the Turkish protest." *The Times*, June 24, 1878 (Telegram from St. Petersburg).

taken from the Austrian Staff map, but it was not considered advisable that such statement appear in the treaty. As the explanation, however, was "very important," Bismarck was of opinion that it should be mentioned in the protocol. (Protocols, p. 276.) For the frontiers of Asia-Minor Russian maps chiefly were used, but contributed little to exact knowledge of the territory, the Boundary Committee confessing in one instance that they did not have the "maps and documents necessary to enable them to come to any decision." (Protocols, p. 269.)¹

PRINCIPLES APPLIED.

From what has been already indicated, the principle underlying the work of the Congress will be easily apparent—that of "strategical rectification of frontiers" without any necessary regard to racial affiliations or national aspirations.² Nationality as a principle found little, if any, sincere support from the great powers, but was confined for its expression to the pious wishes of the smaller nations admitted by the grace of the Congress to state their claims or to the futile appeals of the Turkish plenipotentiaries.³ In Parliament, the opposition tried to secure from the British Government a pledge that the Balkan settlement should be made not on the basis of "dynastic arrangements or geographical puzzles," but on the just principle of nationalities; but the Government refused to make any definite engagement.⁴ Gortchakoff, in his note communicated to Salisbury, April 13, 1878, had advocated "majority of populations," as the prin-

Strategical rectification of frontiers.

Principle of nationality ignored.

British Government noncommittal in Parliament.

Gortchakoff puts forward principle of "majority of populations."

¹ "The maps of that part of Armenia are so inaccurate and contradictory that it is difficult to settle the frontiers from here." Hohenlohe, *Memoirs*, p. 224.

² At the session of June 17, Salisbury made the following observations:

"* * * It is our task to replace her [Turkey], not upon the footing of her former independence, for it would be impossible entirely to annihilate the results of the war, but to restore to her a relative independence which shall permit her efficaciously to protect the strategical, political and commercial interests of which she is to remain the guardian * * *."

"England has never admitted * * * that it was necessary, in order to guarantee the populations of European Turkey against the abuses of the Government and against oppression, to detach them from the political supremacy of the Porte. This guarantee, which is to be of the very highest importance, requires rather the reform of the internal administration than a political separation." *Protocols*, p. 24.

³ See the address of M. Delyannis, the Greek Minister for Foreign Affairs before the Congress on June 29, and those of the Roumanian delegates on July 1. *Protocols*, pp. 133-134, 151-153.

"The first Ottoman plenipotentiary argues against the cession of Antivari to Monte negro. The Porte would have no objection to Spizza, but she maintains that Antivari belongs to the Albanians, and that the Montenegrins would only be able to dwell there by force, against the wish of the population." *Protocols*, p. 156.

⁴ Consult the debates on the supplementary estimate, Jan. 31-Feb. 7, 1878 (*Hansard-Parliamentary Debates*, 3d ser., vol. 237, pp. 729-1313 *passim.*), especially the speech of Sir William Vernon Harcourt (*ibid.*, pp. 1114-1130). See Appendix IV.

ciple to govern. "Nothing," he maintained, "more equitable or rational could be imagined."¹ So, too, argued the Turks at the Congress, but to no purpose.² The policy that was to control was set forth in Salisbury's instructions to Lord Odo Russell of June 8, 1878:

"In the judgment of Her Majesty's Government, it [Bulgaria] should not be allowed to extend south of the Balkan range * * *. Great care * * * should be taken that while every necessary safeguard is provided for the good government of the population, the political and military authority of the Sultan's Government is sufficiently secured to provide against the risk of this province being made the field of treasonable intrigue or the gate of an invading army * * *. It is very important for the security of Constantinople that they [the Turks] should continue to occupy the passes of the Balkans."³

British Government against extension of Bulgaria south of Balkans.

This policy of strategical and political considerations was early adopted by the Congress, nominally at the instance of Austria, in reality on the insistence of Great Britain, and every page of the protocols testifies to its triumph.⁴ Bismarck lost no opportunity to promote it and of all the representatives at the Congress he was most out of sympathy with the national aspirations of the small peoples. He opposed the admission of the Roumanian delegates, whose claims did not seem to him "of a nature to facilitate a good understanding," and supported Russia on the question of Bessarabia

Policy of strategic frontiers triumphant at Congress.

Bismarck not in sympathy with small peoples. Opposes Roumania.

¹ British and Foreign State Papers, vol. 69, p. 817.

Thus also Gortchakoff at the Congress:

"Distributions of territory, proposed without regard to the principle of the majority of the population might be suggested not by considerations of race, but by particular views of political, geographical, or commercial interest. Russia having, as far as she herself is concerned, no material advantage to seek in these countries, can only estimate these various propositions from one point of view, viz., that of equity and conciliation, to which she is always inclined, with a view to the consolidation of an European agreement and of general peace." Protocols, p. 36. See also *ibid.*, pp. 24-25.

² " * * * The Quadrilateral [should] be left in a military sense at least in their [Turkish] possession—a thing they deem themselves all the more entitled to, as there can not be the least doubt that the majority of the population thereabouts is Mohammedan. They think that while thus shaping out the new Bulgaria more in conformity with the principle of race they might have a far better line of defense than if the Balkan, were chosen as such." The Times, June 20, 1878. (Vienna Correspondence.)

³ British and Foreign State Papers, vol. 69, pp. 834-835.

⁴ "Moreover, a point which will avert many difficulties has been obtained by Austria. It has been thoroughly agreed that questions of strategic interest shall have precedence over all ethnographical considerations, so long used in the Eastern Question to suit the fancies of ambitious persons. As soon as the settlement of any matter is arrived at, the putting of it into execution will be primarily determined by officers from a thoroughly strategical point of view * * *. In this way the line round Sofia is considerably reduced, whereas on ethnographical grounds it would have been much more extended and might have menaced the road from Salonica." The Times, June 24, 1878. (Berlin Correspondence). See also The Times, July 1, 1878.

Limits of the privileges of the Greeks. Impatient with Armenian question. Indifferent to Balkan States.

(Protocols, pp. 135-138). He was careful to impress upon the Congress that the privileges accorded to the Greek representatives were strictly limited (*ibid.*, p. 38). The proposal of Salisbury that the Armenian question should be given its day in court produced in the Chancellor a notable burst of impatience,¹ while his indifference to the ultimate welfare of the Balkans was only exceeded by his studied incivility toward the Turks.²

No power maintained consistent-
ence of principle.

Great Britain supports nationality for Greeks and Batoum.

To state it exactly, however, no power maintained any one principle consistently throughout, but took its position on each question according to its particular concept of diplomatic expediency. Thus Great Britain, insisting upon strategic frontiers in the delimitation of Bulgaria, urged ethnographical considerations for the Greeks and for Batoum (Protocols, pp. 22, 24, 208), although, in the case of Greece, these arguments were not pursued by the British plenipotentiaries with especial zeal, the Greeks being told by Beaconsfield that "states, like individuals, which have a future, are in a position to wait" (*ibid.*, p. 198). Russia, on the other hand, loud in her professions of respect for the principle of nationality, had defied it in the treaty of San Stefano and played counter to it when her vital interests were involved at Berlin, especially in the cessions of Bessarabia and Batoum.³

Russia defies it in Bessarabia and Batoum.

Austria's policy — occupation of Bosnia-Herzegovina.

Of the interested great powers, Austria came nearest to a uniform policy. According to Hohenlohe, Andrassy told Waddington that he "must occupy Bosnia and Herzegovina at any price" (Memoirs, II, p. 213).

¹ "Lord Salisbury announced a proposal as to the Armenians which brought the remark, '*Encore un de plus!*' from the Chancellor." Hohenlohe, *Memoirs*, p. 230.

"The President observes that it is, perhaps, difficult to carry out repressive measures among independent tribes, and His Serene Highness raises doubts as to the practical efficacy of the article proposed by Lord Salisbury." Protocols, p. 210.

² "His Serene Highness thinks that the Congress is not in a position to find a remedy for all these dangers. If the Bulgarian population, either through ill will or innate incapacity, can not make their new institutions work, Europe will in truth be obliged to take counsel, but later on and when that time shall have arrived * * *. To take into consideration contingent questions relative to the future of Bulgaria, which interests Germany and doubtless some of the Powers here represented, only in view of the question of the general peace, would be to extend the task of the Congress beyond its limits." Protocols, p. 64.

Hohenlohe, commenting on this "attack * * * on the peoples of the Balkan peninsula," says that the Chancellor "was quite indifferent to the fate of these peoples." *Memoirs*, II, p. 215.

³ "It is thought this evening that the question of the Lazes has a more serious import than was generally believed * * *. The Russians object to a war like population sheltered by mountains just without their new possession." *The Times*, July 8, 1878 (Berlin correspondence).

"Batoum had not surrendered, nor was it handed over to the Russians till September 6, 1878, after protests on the part of the population, which at one time threatened serious consequences." T. E. Holland, *Studies in International Law*, p. 244.

For a fuller discussion of nationality and the Batoum frontier, see Appendix V.

But her designs went further. She was out to curb the vigorous young peoples just beginning to realize statehood,¹ and in this she succeeded, thanks to the forward-looking policy of Bismarck and the near-sighted acquiescence of Great Britain. But Austria's aim, as expressed in the language of her first plenipotentiary, appeared unimpeachable. It was to create a "state of affairs which shall give the greatest possible chance of duration and stability." (Protocols, p. 48.) How durable and how stable, the Bosnian coup of 1908 and the tragedy of Serajevo grimly attest!

To sum up, the Congress, through those controlling its decisions, was animated by but two considerations: (1) That collective Europe alone can dignify claims of nationality with recognition,² and (2) that, in the words of Beaconsfield at the sitting of June 22, "it remains established, in fact, by unanimous assent, that the Sultan, as a member of the political body of Europe, is to enjoy a position which shall secure to him the respect of his sovereign rights." (Protocols, p. 43.)³

GENERAL CONDUCT OF BUSINESS.

From the technical point of view the Congress of Berlin was a model of orderly procedure and definite results. The personality of Bismarck, then in the vigor of his intellectual powers, gave to the deliberations a direction which made for accurate, pertinent, and summary business arrangements. The Chancellor, however, was in ill health at the time, and for that reason a somewhat rapid *tempo*, if not outright impatience, may be detected,

Curbs Serbia and Montenegro.

Two controlling considerations:

1. Sanction of European concert.

2. Preservation of Ottomans over-
eignty.

The congress a model technically.

Business direction given by Bismarck.

Occasional haste, due to Bismarck's ill health.

¹ "June 19. Blowitz came to me this morning. He said he was beginning to be uneasy about the result of the Congress. Austria was showing more determination and resolution than he had hitherto credited her with. She did not at all wish that Montenegro should be allowed to receive Antivari, and that the Serbs, with Bosnia and Montenegro, should proclaim an empire under Nikita * * *. Austria wishes * * * to be forced to invade those countries * * *." Hohenlohe, *Memoirs*, II, p. 212.

² "Prince Bismarck observes that the question is whether or not the powers are agreed to recognize the independence of Roumania * * *. Europe alone has the power to sanction independence. She has then to ask herself under what conditions she will adopt that important decision, and if she considers that these conditions shall be the same as those already established by the Congress in the case of Servia." Protocols, p. 153.

³ Beaconsfield elaborated this point of view at the session of July 5, in part, as follows:

"His Excellency, seeking for the motives of this attitude [the expectant attitude of Greece] thinks that it should be attributed to the false idea that was formed, after the conclusion of the treaty of San Stefano, as to the principles which should guide the Congress. An erroneous opinion attributed to the Congress the intention to proceed to the partition of a worn-out state (*etat vieilli*), and not to strengthen, as the high assembly has done, an ancient empire which it considers essential to the maintenance of peace. It is true that often after a great war, territorial rearrangements are brought about * * *. The word "partition" can not be applied to such arrangements and retrocessions, and the Greek Government was entirely mistaken as to the views of Europe * * *." Protocols, p. 197.

even in the colorless statements of the protocols.¹ At the sixth session, Bismarck, urging the Congress to avoid discussion of details, alluded to "the state of his health, which will not permit of his assisting at many more meetings" (Protocols, p. 79), and during the *pourparlers* over Batoum he flatly announced that if a settlement was not arrived at in 24 hours, he would leave for the more restful atmosphere of Kissengen.²

Danger of withdrawal of power from the Congress.

Attitude of Austria.

Disraeli's coup.

Disclosure of secret agreements.

One consideration gave Bismarck pause and set a limit to his complete domination of the Congress. In the background there was always looming up the possible withdrawal of one or more of the powers and the consequent rupture of the negotiations. Here the British plenipotentiaries had the weather gage. Austria might wish to employ that stratagem, but, in the opinion of competent observers, would not have taken the initiative herself. Great Britain, however, was prepared to follow a line of her own.³ During the discussions on Bulgaria, the British plenipotentiaries presented a virtual ultimatum of four points, which the Russians took as a referendum. Meanwhile, having concluded that Russia could not yield the points, Disraeli had decided to leave the Congress and had gone to the length of ordering by telegram a special train from Cologne. Bismarck heard of it, promptly intervened with a personal call at Beaconsfield's hotel, and at the next session the surrender of Russia was complete.⁴

Other difficulties beset the Congress, but Bismarck met them all. The disclosure of secret agreements, especially the Anglo-Russian convention of May 30, had such a reaction in Great Britain, and so directly affected the position of the British plenipotentiaries at the Congress,

¹ "July 5. * * * This impatience on the part of the chancellor, which is justified by his state of health, accelerates the work, but its disadvantages will be felt later, since much will only be superficially settled. I should prefer slower work." Hohenlohe, *Memoirs*, II, pp. 220-221.

² Hanotaux, *Contemporary France*, IV, p. 354.

³ "June 19. Blowitz came to me this morning. He said he was beginning to be uneasy about the result of the Congress * * *. It might * * * happen that Austria became dissatisfied and might contemplate the possibility of leaving the Congress. But she did not wish to act thus alone, and had therefore sounded England to see if she also was prepared to retire from the Congress in case the necessary concessions in Bulgaria were not made her. The Englishmen had not answered that. Blowitz thought it would be a very good thing if the Englishmen's demands were satisfied, for then there would be a certainty that Austria would not by herself abandon the Congress. England, however, whether she was left alone or was dissatisfied, would not be in the least perturbed at the idea of abandoning the Congress alone." Hohenlohe, *Memoirs*, II, p. 212.

⁴ For the authentic account of this incident, see A. N. Cumming, *Secret History of the Berlin Treaty*, in *Nineteenth Century and After*, vol. 58 (1905), pp. 83-90. This is a transcript of a conversation with Lord Rowton (Montagu Corry), who attended the Congress as Disraeli's private secretary. See Appendix VI.

that it required all the skill at the command of the Chancellor to secure a compromise and avoid a break.¹

Then there was the personal equation. Gortchakoff was ill, vain, and fond of attention, Disraeli, quizzical and inclined to pose. Feeling showed itself at times, even between members of the same delegation.² Bismarck, however, played upon them all with a sure touch.³ Even their differences were sometimes fomented by the Chancellor "in order to have the pleasure of arranging them." But he always kept his eye on a settlement. Bismarck wished for peace at the time, having already secured what he had designed to get by the sword. Thus, while he put Russia "on the stool of repentance" he aimed not to make reconciliation with Germany impossible. France he treated with courteous consideration.³ Great Britain was given a dignified, if frigid, respect. Only the Turks met with uniform rebuff, having on most questions, in Bismarck's view, "neither an opinion to offer nor a decision to take in Congress." (Protocols, p. 270.)⁴

Influence of personality.

Bismarck desirous of peace.

His treatment of the powers.

But with all his gruff imperiousness, Bismarck showed tact in the essentials and it was due to his keen instinct for the conduct of affairs and his profound knowledge of human nature that the Congress was carried to a successful issue. The plenipotentiaries may have played at real

Bismarck's tact and practicality.

¹ See Hanotaux, op. cit., IV, pp. 350-351.

² "June 25. Schuwaloff told me before yesterday's sitting he had on the day before prevented a telegram from Gortchakoff being sent, in which the latter wished to state to the Emperor of Russia that he was ill, and could not therefore accept the responsibility for the last resolutions. Schuwaloff declared that, if this telegram went, he would telegraph to the Emperor asking him to send another plenipotentiary. The telegram was therefore stopped." Hohenlohe, *Memoirs*, II, p. 215.

"July 5. * * * Haymerle reported on the frontiers of Montenegro. In this connection he read a printed list of the various points, which was incomplete. St. Vallier called his attention to the defect. Andrassy was indignant that his Austrian colleague should have made himself ridiculous, and muttered some uncomplimentary remark * * *." Ibid., p. 220.

³ Thus Schuwaloff writes of him:

"Prince Bismarck presided over the Congress with a certain military brusqueness of manner which did not displease those present and which the representatives of all the Powers took in good part, the two English Ministers not excepted, from whom I had awaited more haughtiness." Cited in Hanotaux, op. cit., p. 347.

And Carathéodory Pasha remembers him with reason, as follows:

"The Congress of Berlin was completely dominated by Prince Bismarck * * *. The confidence and fear that he inspired were general * * *. Long accustomed to the most complete independence, he looked upon the slightest observation as a desire for resistance which he hastened to suppress with nervous impatience and a will of iron." Cited *ibid.*

"His incontestable superiority, the awe that he inspired amongst the be-medaled and be-ribboned dignitaries that surrounded him, ought to have made him more indulgent. The individualities of these lofty personages aroused his formidable criticism. Beaconsfield was not spared any more than was Gortchakoff. He only mocked at their solemn methods of procedure, their romantic and slightly old-fashioned ways." Ibid., p. 353.

⁴ See also Hohenlohe, *Memoirs*, II, pp. 209-210.

business, but the correct forms and formulas were carefully observed. In the outward unanimity and technical precision of the Berlin Congress the European Concert achieved its masterpiece.

THE QUESTION OF GUARANTEES.

At Berlin, as always in great international settlements, a sanction for the execution of the negotiated treaty had to be considered by the plenipotentiaries. It was brought before the Congress in a direct way by Prince Gortchakoff at the session of July 8, in a formal declaration expressing the wish that the work, "wrought in a spirit of conciliation, may secure to Europe a solid and durable peace." After pointing out Russia's special interest in preventing the recurrence of periodic crises in eastern Europe, the First Plenipotentiary of Russia asked the Congress "by what principle and in what manner it proposes to insure the execution of its high decision."¹ This communication was placed on the order of the day for the next session (July 9), but discussion on that occasion was adjourned until a definite proposal had been formulated by the Russian delegation as follows:

"Europe having given her most solemn and binding sanction to the stipulations of the Treaty of Berlin, the High Contracting Parties regard the totality of the articles of the present act as forming a combination of stipulations the execution of which they engage to control and superintend, while insisting on their being carried out entirely in conformity with their intentions.

"They reserve to themselves the right to come to an understanding, in case of need, as to the requisite means to insure a result which neither the general interests of Europe nor the dignity of the Great Powers permit them to leave invalid." Protocols, p. 253.²

¹ "Russia is especially interested in this. She has made great sacrifices during the war; she has made considerable ones with a view to the reestablishment of peace and of the maintenance of the good understanding of Europe. She has the right to expect that at any rate these sacrifices shall not be made gratuitously, and that the work of which they have laid the foundations shall not be fruitless, through want of execution, as have been the previous attempts at pacification in the East * * *. The plenipotentiaries of Russia are persuaded that this thought is shared equally by the High Assembly, and that it would not raise an ephemeral structure which would expose the peace of the East and of Europe to fresh dangers." Protocols, p. 232.

² "Lord Salisbury having asked whether the terms of this proposition imply the necessity of employing a foreign force in case the treaty be not carried into effect, the President declares that in his opinion this could not be the case. In the opinion of the President, the Powers engage themselves only to an active superintendence, to be followed, in case of need, by diplomatic action. The second part of the document reserves, it is true, to the Powers the faculty of coming to an understanding as to the means of ulterior action, but, at the same time, without imposing any obligation on any of them." Ibid, p. 253.

Considerable debate over this formula submitted by Görtchakoff took place at the sitting of July 10, but its real consideration went over to the following session (July 11). The differences of opinion were fundamental. Carathéodory thought that sufficient sanction had been already created in the shape of European commissions. For the rest, the execution of the stipulations should be made to depend upon the bona fides of the signatory powers. Under the Russian proposal, the Porte would find itself obliged "to admit within its limits the control of other states, and in turn to exercise a control in other states having the same engagements" (Protocols, p. 265)—obligations too "novel and weighty" for the Turkish Government to assume. The Russian delegation, in support of the proposal, saw "nothing but good in surrounding with every guarantee of efficacy a treaty concluded by the most eminent statesmen in Europe," and "had solely in view the maintenance of the dignity of the European stipulations." (Protocols, pp. 239-240, 253.) Salisbury was against the insertion of such a declaration in the treaty, and knew "of no sanction more 'solemn' and 'binding' than the signature of his Government," for which reason he proposed not to accept an engagement which appeared to him "either to be useless * * * or to have a signification of too undefined a bearing." (Ibid., p. 265.) The same objections, in more elaborated argument, were urged by Waddington, who feared that the clauses of the treaty might become, "under the action of a control decreed by the Congress, a series of pretexts for an incessant interference in all the acts of the Sublime Porte." (Ibid., p. 266.)¹

Differences of opinion.

Carathéodory finds sanction in bona fides of powers.

Russian delegation would reinforce the treaty.

Salisbury considers proposal useless or vague.

Waddington sees danger of incessant interventions.

Andrassy thought the proposal of Görtchakoff should be abbreviated. The second paragraph, in his opinion, "might be interpreted as a want of confidence on the part of the Congress in the result of its labors," and, in the sense of his criticism, he offered an amendment.² Bismarck, while giving, along with the other German plenipotentiaries, the only vote in favor of the Russian

Andrassy offers amendment.

Bismarck against obligatory use of force.

¹ "July 12. * * * Full meeting at 2 o'clock. The proposal of Görtchakoff as to a formal and grandiloquent concluding paragraph was negatived. Görtchakoff was much annoyed. Waddington remarked, with his customary *bon sens*: 'Either it is verbiage, in which case the article is superfluous, or it has some meaning—then it is dangerous.' " Hohenlohe, *Memoirs*, II, p. 225.

² Andrassy's amendment was as follows:

"The high contracting powers look upon the totality of the articles of the present act as forming a collection of stipulations, of which they undertake to control and to superintend the execution." Protocols, pp. 264-265.

proposal (as modified by Schouvaloff), had, on the occasion of Gortchakoff's earlier declaration, crystallized the opinion of the Congress against any sanction implying the obligatory use of force on the part of each state separately. On the other hand, on his view of it, "if the powers engaged themselves jointly to use force at need, they would risk the provocation among themselves of grave disunion."¹ He merely contented himself with having no objection to the recognition, in a special article, that "the powers may reserve to themselves the right to control by their agents the execution of the resolutions of the high assembly." (Protocols, p. 240.)

Approves reservation of right to control.

Proposal and amendment defeated.

Both the Russian proposal and the Austrian amendment failed to secure the assent of the Congress. The results, consequently, of the discussions thereon were, as stated by Bismarck and entered on the protocol, "the proposal itself, the answer of the Porte, and the decisions of the Congress to take note of the declarations of the First Ottoman Plenipotentiary." (Protocols, p. 267.)

7 SIGNATURE, RATIFICATION AND COMMUNICATION OF TREATY.

Signing of treaty.

The concluding session of the Congress was devoted to the signing of the treaty. All the plenipotentiaries were present, in uniform, and each signed seven copies, which had been prepared. But inasmuch as it is ratification, not signature, of a treaty that gives it validity, the question had arisen at the session of July 12, "in what form and at what date the treaty shall be communicated to the states concerned who have not taken part in the Congress." The sense of the discussion was that official communication could not be made until after exchange of ratifications, which was to take place "within three weeks, or sooner if possible." It was thought advisable, however, that these states should at once be informed of the arrangements affecting them, and, accordingly, the president was authorized "to make known, after the

¹ "Prince Bismarck does not believe that it is possible to find a formula which would guarantee Europe absolutely against the recurrence of those matters which have disturbed her. * * *

"The Congress can perform only a human work, subject, like every other, to the fluctuation of events * * *. Prince Bismarck does not think that beforehand the Congress can be supposed to imagine that the resolutions, taken solemnly, by all Europe united, would not be executed. It would be necessary to wait for an infraction in order to take notice of it, and in this case the powers, warned by their representatives at Constantinople, could arrange to appeal to new diplomatic assemblies." Protocols, p. 240.

signature, to the States interested, the decisions which concerned them in an authentic draft, but communicated in an unofficial form." (Protocols, p. 277.) The complete treaty was transmitted to them, officially, after ratifications had been exchanged. Other states informed unofficially before.
Officially after ratification.

The final act in the negotiations was effected at Berlin, August 3, 1878, in a *proces-verbal* recording the exchange and signed by the representatives of the signatory powers accredited to the Court of Berlin, or by secretaries authorized to sign *ad hoc*.¹ The Turkish instruments of ratification had not arrived, but the Turkish ambassador announced that his Government had ratified and that he would be prepared to make the exchange for Turkey within 15 days. When this was done in good and due form, the labors of the Berlin Congress were officially at an end.² Proces - verbal recording exchange of ratifications, August 3, 1878.

¹ For the *proces-verbal*, see British and Foreign State Papers, vol. 69, p. 768.

² "Each diplomatic representative received a copy of this *proces-verbal* in which his sovereign was named first and his own signature attached first, the others being placed in the alphabetical order of the countries represented, according to the French language." Sato w, Diplomatic Practice, II, p. 253.

APPENDIX I.

REPRESENTATION AND PERSONNEL OF THE CONGRESS OF BERLIN.

GERMANY.

Plenipotentiaries.—Prince Bismarck, Under-Secretary of State von Bülow, Ambassador Prince Hohenlohe-Schillingfürst.

Secretaries.—Privy Councillor of Legation Bücher, Envoy von Radowitz, Councillors of Legation Busch, and Baron Holstein, Secretaries of Legation Von Bülow, Count Herbert Bismarck, Count Rantzan, Lieut.-Col. Blühme of the Prussian General Staff.

AUSTRIA.

Plenipotentiaries.—Count Andrassy, Ambassador Count Karolyi, Privy Councillor Baron Haymerle.

Secretaries.—Chief of Section Baron Schwegel, Envoy Herr von Teschenberg, Councillors Baron Hübner, Von Kosiek, Doczy, Von Ascher, Secretary Von Peschy, Councillor of Embassy Baron von Mayr, Councillor of Legation Baron Pasette.

FRANCE.

Plenipotentiaries.—M. Waddington, Ambassador Comte de St. Vallier.

Secretaries.—M. Despres,¹ Director of Political Affairs of the Foreign Office; M. Duclerc, Assistant Division Chief; Secretaries of Embassy, Comte de Moüy, Fourchon, Paul Despres de la Motte, Attachés Comte Montalivet, Viscount de Beaucaire, M. Darmet.

GREAT BRITAIN.

Plenipotentiaries.—Lord Beaconsfield, Marquis of Salisbury, Lord Odo Russell.

Secretaries.—Mr. Montagu Corry, Mr. Philip Currie, Mr. Henry Neville Dering, Mr. Hertslet, Mr. Algernon Turnor, Mr. Austin Lee, Hon. J. Bertie, Hon. Eric Barrington, Mr. Chas. Hopwood, Mr. E. Le Marchant Gosselin, Mr. Arthur Balfour, Lieut. Gen. Sir Lintorn Simmons, Capt. Edwards, Capt. Ardagh, Capt. Fitz-George, Lord Cranborne, Mr. E. B. M. Mallet.

¹M. Deprez was not a secretary, as The Times here states, but Third French Plenipotentiary. See supra, p. 9, note 1.

ITALY.

Plenipotentiaries.—Count Corti, Ambassador Count Launay.

Secretaries.—Councillors of Embassy Curtopassi and Chevalier Tosi, Secretaries Marquis Bialbi, Marquis de Malaspina.

RUSSIA.

Plenipotentiaries.—Prince Gortchakoff, Ambassador Count Schouvaloff, Ambassador Baron d'Oubril.

Secretaries.—Privy Councillor Baron Jomini, Councillor of State Baron Fredericks, Secretary of Legation Count Adlerberg, Councillors Sorokine and Ivanoff of the Asiatic Department of the St. Petersburg Ministry of Foreign Affairs, Gen. Anjutschin, Colonels Bobrikoff and Bogoluboff.

TURKEY.

Plenipotentiaries.—Alexander Carathéodory Pasha, Ambassador Sadoullah Bey, Gen. Mehemet Ali Pasha.

Secretaries.—Parnies Effendi, Councillor to the Minister of Foreign Affairs; Feridoun Bey, Division Chief of the Ministry of Foreign Affairs; Secretary of Embassy Ohan Bagdadian, Matchik Effendi, Navum Effendi, Division Chief of the Ministry of Foreign Affairs; Col. Izzet Bey, Mr. Parnis, an English jurist.

(From The Times, June 13 and 14, 1878.)

APPENDIX II.

DEBATE IN THE HOUSE OF LORDS, MARCH 11, 1878, ON THE PRESIDENCY OF THE PROPOSED CONGRESS.

Earl Stanhope in rising, according to notice, to ask the Secretary of State for Foreign Affairs, whether, in the event of the ensuing conference taking place at Berlin, he will urge that under no circumstances is it desirable that the representative of either of the belligerents should preside, said:

My Lords, I am aware that it is the general practice, when a conference or a congress takes place abroad, that the representative of the country in which the congress is held should preside. We have heard that the coming conference—if it is to be held at all—will take place at Berlin. It follows, therefore, that Prince Bismarck will preside. My Lords, I saw on Thursday last in the *Allgemeine Zeitung* a statement to the effect that the condition of the Prince's health is such that he is not likely to fulfil this arduous duty; and, in that case, supposing he does not, what will happen? I think, my Lords, it is possible—nay, even likely—that the senior representative of the great powers, Prince Gortchakoff, the senior in age, and therefore in experience, may be called upon to take the chair. I might be told this is most unlikely; but when we consider how long and intimate a friendship has existed between the German Chancellor and Prince Gortchakoff—an intimacy commencing 28 years ago at Frankfurt—when one reflects how it has produced the most tremendous results which have ever altered the map of Europe, it is very important that some attempts should be made to avert such a contingency. (*Hansard, Parliamentary Debates, 3d ser., vol. 238, pp. 1036–1037.*)

The Earl of Derby:

* * * My noble friend is no doubt aware that generally—I believe invariably—at all congresses and conferences that have been held in recent times, the rule has been that the representatives themselves, on their first meeting, should elect the person who should be their president, and settle the course of their future proceedings. A further custom has also grown up which, by lapse of time, has acquired almost the force of a rule, that, unless there be a special reason to the contrary, the representative of the power in the capital of whose country the conference or congress is held is the person elected for the purpose. It would, therefore, follow, that if the congress was held at Berlin, the presidency would probably be offered to Prince Bismarck; and I have no reason to suppose that, if he attends the congress at all, it would be his intention to decline it. If he were to do so, I apprehend that, according to usage, what would happen would be this—that the congress would proceed in the same manner as before to choose another president. I ought to add that, as far as I am aware or can learn, there is no special power or authority attached to the position of the president on such an occasion. He is *primus inter pares*. It is simply an honorary distinction. He has precisely the same rights and powers of dealing with subjects submitted to the conference that any other member has. Under those circumstances I

do not think it would be desirable to do that which certainly would be a very unusual step—to make it a condition of going into the congress that special rules of exclusion from the presidency should be applied to the representatives of one of the powers principally concerned. I am not aware that there is any precedent for a course of that kind being followed, and it is clear that no general rule can be laid down for the exclusion of the representatives of the belligerents. There have been cases, and there may be so again, of conferences attended by the representatives of the belligerent powers alone, and if a universal rule of exclusion were to be applied to them, there would be no person to preside at a conference. (Hansard, *op. cit.*, pp. 1039–1040.)

APPENDIX III.

(See *supra*, p. 28, note 2.)

Prince Gortchakoff, however brilliant he may have been at one time of his life, was not a man of business. He was skillful over phrasing, but kept always to generalities, and I do not exaggerate in affirming that before his failure of health he was incapable of pointing out on the map, even approximately, the different countries of the Balkan peninsula, or, for instance, the position of Kars and Batoum. When the prince talked business he liked to "tracer les magistrales," as he expressed it; in short, as he also said, to generalize. * * * I was, therefore, considerably alarmed when he informed me one fine day that he had given up all other questions to me, but that he specially reserved that of Batoum to himself. * * * He could deal with it directly with Lord Beaconsfield. * * * The Congress was drawing to a close. * * * Prince Bismarck, anxious to set off to Kissingen, endeavored to bring matters to a settlement and questioned me daily as to whether an agreement on the Asiatic frontier had been arrived at between Russia and Great Britain. I told him that Prince Gortchakoff had reserved this negotiation for his own handling. I made the same communication to the Marquis of Salisbury, who was drawing me very closely, and he replied with some vexation: "My dear Count, Lord Beaconsfield can not negotiate! He has never seen a map of Asia Minor!" * * * Prince Bismarck at last announced that if we were not ready within the next 24 hours he would start off. A few hours afterwards we heard to our relief that a complete agreement had been arrived at between Lord Beaconsfield and Prince Gortchakoff. The prince promised to announce it at the next sitting of the congress.

It must be stated, in order to understand what follows, that each of us possessed a map of Asia on which our *état major* had traced the frontier of the treaty of San Stefano in one particular color, and another line of different color to show the *ne plus ultra* of what the plenipotentiaries could yield to the insistence of Great Britain. Needless to add, the second line was, to some extent, a state secret.

This last assembly, devoted to the Asiatic question, was a serious occasion. On its result hung the issues of peace or war. The president suggested that the two negotiators, Lord Beaconsfield and Prince Gortchakoff, should sit side by side to point out the tenure of their agreement. The two gentlemen therefore took their places, each one spreading out before him a map traced for the occasion. We others stood in a group behind them. I at once foresaw the trouble and confusion that would ensue. Gortchakoff's map had one line only, that of San Stefano, and the prince declared emphatically that "my lord" had accepted it. Beaconsfield, however, replied to the prince's declaration by a laconic "No, no!" and pointed out, on his own map the line to which he had consented. Now, to my great astonishment, this line in all its sinuosities, was precisely the one that we had the right to accept as the extreme limit of our agreement.

The contradiction between the two plenipotentiaries tended to embitter the discussion. Each stood obstinately by his own line, when Prince Gortchakoff got up, seized my hand, and said to me: "There is some treachery; they have had the map of our *état major*."

I learned afterwards that on the previous day Gortchakoff had asked for a map of Asia Minor. He was given the confidential map of the two lines. He showed it to Lord Beaconsfield, lending it to him for a few hours so that Lord Salisbury could see it.

The Englishmen, noticing a line that threw back the frontier of San Stefano, had adopted it for their own map. This was the explanation of the imagined treachery. * * *

The president of the Congress, perceiving the two negotiators more and more entangled in their difficulty, ironically suggested compromise: The congress should be suspended for the space of half an hour, during which the second German plenipotentiary, Prince von Hohenlohe, should put the matter to the vote. * * * Well, the matter turned to our advantage. I stood by the line of San Stefano, the Marquis of Salisbury to the *ne plus ultra* traced by our *état major*. Prince von Hohenlohe proposed a middle line which would divide that under dispute into two equal parts. I accepted, and the question was decided. We signed the treaty two days afterwards. (From Souvenirs of P. Schouvaloff, quoted in Hanotaux, Contemporary France, Vol. IV, pp. 353-355.)

APPENDIX IV.

Sir William Vernon Harcourt on the principle of nationality (Hansard, Parliamentary Debates, 3d. ser., vol. 237, pp. 1127-1130):

* * * But what is the true principle upon which you ought to go into this congress? I think if you want to get a permanent settlement of Europe, you should see what are the causes which have destroyed the previous settlement. The Treaty of Vienna of 1815 was negotiated by great statesmen. There were giants in the land in those days; but they made a gigantic blunder, and their work has failed. The Treaty of Vienna was signed 12 years before I was born, and in my lifetime I have seen every bit of it torn into fragments. The chain first broke where it was weakest, for a chain is no stronger than its weakest link. It broke in Greece. The emancipation of Greece under the influence of England, was the first breach in the Treaty of Vienna. Then followed the emancipation of Belgium; then that of Italy; then came the Holstein affair, and then the break-up of the German Confederation at the battle of Sadowa, and it was completed at the battle of Sedan. Why has the Treaty of Vienna failed? Because the negotiations were founded upon principles which were radically false. It had relation only to dynastic arrangements and geographical puzzles. It was made to suit the ambition of rulers, and it neglected altogether the interests and the sympathies of nationalities and populations. I do not wonder that the negotiators at Vienna made that mistake, fatal as it was. When after the deluge of the French Revolution, the spires of ancient institutions began to appear out of the flood, it was not unnatural that a different view should be taken from what is taken now; but the edifice was built of untempered mortar; it has broken down, and it now lies in ruins. What is it that has broken down that edifice; what is it that has worked like leaven in the lump; what is it that has destroyed the Treaty of 1815? It is the principle of nationalities. What is it that has made Prince Bismarck so strong in Europe? It is not his armies, great as they are; but it is because he has had the courage and the wisdom to grasp the principle of nationalities, by which he has ground his potentates to powder. What is it that has made Austria so weak? It is because, by the very conditions of her existence, she is the enemy of the principles of nationality and autonomy. What has made Russia so weak? Her treatment of Poland. What has made her so strong? Because she is the vindicator of oppressed races. ["Oh!"] Is she not strong? Is she not the vindicator of oppressed races? You dislike the Slavs. I do not know why. I daresay you know as much about them as I do. The Slavs are a great nationality. You can not extinguish them. They have their rights and their sympathies, and whether you like them or not they will assert their existence.

* * * England may appear at that conference in a character in which she would surpass the influence of Russia, for she might be the champion, not of one race, but of all the races there. I have heard a whisper of an Austrian alliance. Well, Sir, Austria has not had a fortunate history in modern Europe. And why? Because, from the conditions of her existence, she has been opposed to the principle of nationalities, and her Empire has broken away. Therefore it is that she has been obliged to have a dual Government and a dual policy. I should be glad that Her Majesty's Government should have the alliance of Austria for objects which England can desire

and approve—for the protection of Constantinople, for the preservation of the freedom of the navigation of the Straits and of the Danube; but if you are going to purchase that alliance by aiding her in paring down the autonomy of the Christian Provinces of Turkey—if that is what you desire, then I have a right to say that that is a policy not worthy of the English nation. I had hoped * * * that Her Majesty's Government would appear at the congress as the champion of those who have no power to defend themselves—I mean the Greek nationality. But what is the policy on which you ask our confidence? This is far more important than all these party squabbles, because this is the question on which the permanent peace of Europe depends, and upon which the future of England must rest. I hope, therefore, that before the end of this debate, we shall hear from Her Majesty's Government * * * what is the spirit in which you are going to the conference. Are you going to endeavor to save out of the wreck some miserable fragment of a ruined system; or are you going, as you ought to go, to call a new world into existence, to repair the scandals of the old? Are you going to this conference in the spirit of Castlereagh or in the spirit of Canning? That policy, which began by emancipating the Greeks, I hope you are not going to mar it, as the policy of Canning was marred by the Duke of Wellington and Lord Aberdeen. That is a question we have a right to ask before assenting to give you our confidence on the money which you say is required to strengthen you in the negotiations * * *.

APPENDIX V.

The following excerpt from *The Times* (July 9, 1878) indicates just how far the principle of nationality was considered in the Batoum question and generally in all questions before the Congress:

The Agence Russe says:

‘At no stage of the deliberations, even when the question raised was that Russia should concede the Balkan range as the frontier of Turkey, have there been such numerous discussions, pourparlers, and interviews between the Russian and English plenipotentiaries as have been required for the settlement of the Batoum question * * *. Nevertheless, at the meeting of the Commission and the interviews held on Saturday, the question had already made progress toward solution. An agreement had been come to upon the subject of making Batoum a free port and upon the words ‘an essentially commercial port,’ but yesterday Lord Salisbury, at an interview with Prince Gortchakoff, brought forward the subject of the Lazes, a population numbering in all 40,000, of whom there are only 15,000 in the territory which Russia is to receive. Lord Salisbury asked that in the cession to be made to Russia the territory occupied by these Lazes should not be included in consequence of the declarations made by them in their recent address to the British Parliament that they would not submit to the Russian authorities. His lordship based his argument upon the principle of nationalities and plebiscites, which he said the Congress had up to the present made the bases of its deliberations. Prince Gortchakoff replied that the Congress, on the contrary, had in nowise respected this principle either as regards the Bulgarians or the Greeks. His Highness added that as the territory in question was adjacent to the town of Batoum itself, the arrangement proposed by Lord Salisbury would be a constant cause of conflict, especially in view of the shameful trade in Circassian women and children for the harems of Constantinople. Prince Gortchakoff further argued that the address alluded to possessed no significance, as it was promoted by the British consuls. Lord Beaconsfield, it is said, subsequently stated with more precision the essence of the demands made by Lord Salisbury, and a compromise appears to have been the result.’

APPENDIX VI.

Beaconsfield's threatened withdrawal from the Congress, as told by A. N. Cumming in *The Nineteenth Century and After*, July, 1905, pages 83-90:

On the morning after that decision [adjournment to await the Russian answer on Bulgaria] Lord Beaconsfield came into my room. He said: "I have been thinking over this matter very seriously most of the night; and I have quite made up my mind what to do. It seems to me impossible for Russia to concede these points, and, if they refuse, I have sketched out my plan. We will return to England at once. My desire is, if possible, to get to London upon Sunday night and to have a good night's rest. On Monday morning I shall go down to Osborne—or Windsor—and after lunch I propose to lay my report before Her Majesty. A declaration of war with Russia will follow. Kindly make the necessary arrangements for our journey." "I rang for a Bradshaw," said Lord Rowton, "and spent some time in studying it. I found, as a matter of fact, that it would be impossible for us to carry out Lord Beaconsfield's plan. The trains did not suit. We could only get to London on the Sunday night if we took a special train from Cologne. Accordingly, without any hesitation, I wrote out a telegram to the station master at Cologne—whom I happened to know—a colonel somebody—they are all old military officers in Germany—ordering him to have a special train ready for Lord Beaconsfield and myself at such and such an hour on the specified day.

"You may be surprised to hear it, but that telegram was the turning point of the whole affair. The next day or the day after I was walking along a few yards from our hotel when I met Prince Bismarck driving in an open carriage. He stopped it and asked me where Lord Beaconsfield was. I told him that he was in the hotel, and Prince Bismarck asked: 'Can I see him?' 'Yes,' I replied. Then he pulled out his watch and said: 'Look here; at the present moment it is 12 minutes to 4, and I am due with my prince at the palace at 4 o'clock. I wish to see Lord Beaconsfield, and I shall go up to him, but I wish you to come to us at 5 minutes to 4 sharp and announce to me the exact time.' We went along to the hotel, and I showed him up to Lord Beaconsfield's room. Punctually at 5 minutes to 4 I knocked on the door. When I went in, the two were talking about the horribly bad paving of the Wilhelmstrasse. I begged their pardon and told Prince Bismarck that it was 5 minutes to 4. He bowed and thanked me and I left the room. In two minutes the door opened, Prince Bismarck came out, got into his carriage, and drove away. He would reach the palace punctually at 4 o'clock. I went in to Lord Beaconsfield and apologized for having intruded. He said, 'Don't mention it, my dear Corry; you no doubt had a very good reason for what you did. But a very curious thing occurred. The moment after you left the room Bismarck turned sharply to me. We had been talking on indifferent subjects before, but now he said: 'Lord Beaconsfield, do these four points really represent England's ultimatum to Russia?' And I said, 'Yes; they do.'

"The Congress met again for a final decision on this matter at the appointed time. Whilst the meeting was going on I waited outside as usual. After a sitting of a couple

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INTRODUCTION.

§ 1. THE HISTORICAL ORIGIN, DISAPPEARANCE, AND REVIVAL OF THE PRINCIPLE OF THE FREEDOM OF THE SEA.

I. Roman law has already reduced the principle of the freedom of the sea¹ to a legal formula, according to which the sea is "commune omnium";² that is to say, the common property of all.

All things that constitute common property (*res communes omnium*) are determined by some negative and affirmative characteristics. As a first consideration, every exclusive domination, each special privilege, is excluded. This quality of a "*res nullius*" (a thing belonging to no one in particular),³ exhibiting the peculiarity of even rendering impossible a future capacity for occupation, finds its necessarily affirmative complement in a "*usus publicus*" (the principle of a public utility): "the sea is open to all" (Ulpian); that is to say, all mankind has the right in common to use the seas. Everybody is fully entitled to its use, being limited only by the perfectly equal right of others.

According to the Roman conception, this public use is founded upon the "*natura*" (nature): it rests upon natural law (*ius naturale*), or, what is the same in this case, upon the "law of nations" (*ius gentium*).

In Roman law the public use is stamped distinctly as a purely private right, and is safeguarded by an action for personal injury (*actio iniuriarum*). The Romans did not quite possess the right understanding for the common-law aspect of this question; while their hatred for foreigners rendered them totally unprepared for the principle of international law. For that reason a common participation on the part of the states is absolutely foreign to Roman law.

The public use, to the juridical construction and legal nature of which the Romans did not give a single thought, is not confined, how-

¹ Cp. with "Die Entwicklung der Theorie der Meeresfreiheit" (The Development of the Theory of the Freedom of the Sea), Würzburg University Dissertation, 1913; van Calker, "Das Problem der Meeresfreiheit und die deutsche Völkerrechtspolitik" (The Problem of the Freedom of the Sea and German International Policies), 1917, p. 5 ff.; Stier-Somlo, "Die Freiheit der Meere und das Völkerrecht" (The Freedom of the Seas and International Law), 1917, p. 34 ff.

² §§ 1 and 5 J. 2, 1; reg. 2 § 1 D 1, 8 (Marcian); reg. 3 § 1 D 43, 8 (Celsus); reg. 13 § 7 D 47, 10 (Ulpian).

³ According to Schücking (Der Dauerfriede, p. 54), only the open sea is a *res nullius* (a thing belonging to no one in particular).

ever, to the "sea" alone, but includes likewise "on this account the shores of the sea" (*per hoc litora maris*):¹

No one shall therefore be prevented from access to the sea as long as he spares the villages, monuments, and buildings, for these, unlike the sea, do not come under the law of nations. (*Nemo igitur litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis absteineat, quia non sunt iuris gentium sicut et mare.*)²

The law of nations also states that the use of the shores is public, just as that of the sea itself. (*Litorum quoque usus publicus ius gentium est, sicut ipsius maris.*)³

Even the harbors, constituting the natural boundaries of the sea, were regarded by Roman law as institutions subject to public use (*publica*):

Similarly, the right to fish in the harbor is free to all. (*Ideo-que ius piscendi omnibus commune est in portu.*)⁴

The right of "access to the seashore"⁵ is mentioned explicitly and conspicuously in the legal sources as a logical consequence of the public use of the shore. Naturally, access by land finds its counterpart in a landing from the sea.⁶ The latter stands even practically in the foreground and is a matter of course. For that reason, de Lapradelle, too, speaks in the same sense of a "*droit d'accès*" ("right of access") on the part of the ships.⁷

Roman law testifies to the international function of the seas as an intermediary between nations by granting to ships the use of the seashore.

Of course, opinions varied as to the legal aspects of the "public shores." The jurist Neratius placed the shores on an equal footing with those things—

That are derived in the first place from nature and have not become thus far the property of anyone else. (*Quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt.*)

But at the same time he objected explicitly to placing them on an equal plane with the public things,

that constitute the patrimony of the entire nation (*quae in patrimonio sunt populi*).⁸

On the other hand, Celsus states:

I maintain that the shores over which the Roman people have control belong to the Roman nation. (*Litora in quae*

¹ Reg. 2 § 1 D 1, 8. Similarly reg. 3 § 1 D 43, 8; reg. 13 § 17 D 47, 10.

² § 1 J. 2, 1.

³ § 5 J. 2, 1.

⁴ § 2 J. 2, 1.

⁵ § 1 J. 2, 1; reg. 4 D 1, 8.

⁶ Arg. reg. 1, 5 pr. D 1, 8.

⁷ *Annuaire de l'Institut de droit international* (Yearbook of the Institute of International Law), 1910, vol. 23, p. 417.

⁸ Reg. 14 D 41, 1.

populus Romanus imperium habet, populi Romani esse arbitror.)¹

Authoritative utterances are missing concerning the effect of this control, respectively, the kind of public use, not to mention utterances concerning the combination of both; but through the stress laid upon the word "control," the way was indicated that later on was to serve as a basis for state law and for international law.²

II. The freedom of the sea was lost again. Even for this loss Roman law—and particularly the Imperial law—prepared the ground. To the ears of Emperor Antoninus there came the complaint of a certain Eudaemon of Nicomedia, who, after a shipwreck on the Cycladic Islands, fell into the hands of sea pirates; by referring to a certain law of Augustus, Emperor Antoninus ordered a settlement of the case in accordance with the *lex Rhodia de iactu*, at the same time using the following expression:

While I am, indeed, the ruler of the world, the law is the master of the sea. (*Ego quidem mundi dominus, lex autem maris.*)³

This proud expression of the Emperor served as a basis for restoring, in the Middle Ages, the principle of the freedom of the sea. Accordingly, the Emperor of the Holy Roman Empire of the German nation, who claimed also the mastery of the world, expressed in his title that he was likewise "King of the Ocean"; and all sea powers followed this example by pretending to be the sovereign rulers of the adjoining seas. This became of special significance in the days of the great discoveries. Popes Nicolas V, Alexander VI, and Julius II, attempting to play the rôle of Antoninus, and proceeding upon the theory of a world mastery that resulted from the combustions created by the crusades, distributed once more the seas among the nations of the world, drawing at the same time rather rough dividing lines for the sovereignty over the seas.⁴ Up to modern times the freedom of the sea slumbered the sleep of the Sleeping Beauty, until there appeared from Netherlands the knight whose kiss awakened her once more.

III. The reawakening of the principle of the freedom of the sea was brought about by Hugo Grotius. During the conflict of foreign policies between the sea powers, and in defense of the oversea interests of his own native country, Holland, he took once more recourse to the principles of Roman law and succeeded in gaining prevalence for them.

¹ Reg. 3 pr. D 43, 8.

² Compare also Windscheid, *Pand. I.*, § 146.

³ Reg. 9 D 14, 2 (Volusius Maecianus).

⁴ Thus after the great discoveries in 1493, Pope Alexander VI simply drew a line extending from the Azores to the Cape Verde Islands, assigning to the Spaniards the seas lying to the west and to the Portuguese those lying to the east.

1. *The problem of the restoration of the freedom of the sea.*—Spain and Portugal, united since 1580, became opposed in the far East Indies by Holland, which after the founding of the Dutch East Indian Company that took place in 1602 was compelled to defend her colonies in Java against threatening dangers and particularly against Spanish-Portuguese domination in the East Indian waters. In those days of political high tension Grotius stepped into the arena as a patriot with two pamphlets,¹ in which he picked to pieces the Portuguese claims to the Indian Ocean, rejected the papal decision as constituting no legal title, and, taking Roman law as a starting point, proclaimed the principle of the freedom of the sea, which, to be sure, seemed imperative to the safety of Dutch interests in northern, central, and south America, where the Dutch had likewise gained a footing.

The above-mentioned works of Grotius were directed expressly against Spain and Portugal. However, the attack was felt by still another sea power which had just thrown out the gauntlet to Holland and—though only after a long fight—had replaced Dutch maritime domination in exactly the same manner as Spain and Portugal had been compelled previously to give way to the Dutch; the sea power in question was England.² How clearly England perceived the Dutch threat directed against her sovereignty over the seas that surrounded England (*mare anglicanum circumquoque*, narrow seas) may be easily deduced from the fact that the English King, Charles I, demanded the punishment of Grotius as well as the suppression of his pamphlet and (lo and behold!) even threatened with a refutation. The first refutation appeared in 1613 and was written by Albericus Gentilis. It bore the following title: "*Hispanicae advocacionis libri, in quibus illustres quaestiones maritimae secundum ius gentium et hodiernam praxim nitide perlustrantur*" (Books of Spanish Legal Assistance, wherein Important Maritime Problems as well as the Law of Nations and present-day Usages are Splendidly Surveyed).

However, wider recognition was gained by a pamphlet by Selden, which, dedicated to King Charles, was written in 1618 and printed in 1635, and which proved to be a counterpamphlet by the mere wording of its title. This title reads as follows: "*Mare clausum seu de dominio*

¹"*De iure praedae*" (The Right of Booty), 1605 (discovered as late as 1864 and printed in 1868). Also "*Mare liberum sive de iure quod Batavis competit ad Indicana commercia dissertatio*" (The Open Sea or a Discourse upon the Laws Needed by the Dutch in the Pursuit of their Commercial Relations with India), 1609 (at first published anonymously; publication under the author's name took place in 1616). This pamphlet is appended at the present to the Barbeyrac edition of the principal work "*De mare belli ac pacis*," 1720, which is used by me exclusively.

²As early as 1609 Wellwood attempted to demonstrate in his book "*De Dominio Maris*" (The Domination of the Sea) the private character of property on the sea and England's sovereignty over the surrounding seas.

maris libri duo" (The Closed Sea or Two Books concerning the Rule over the Sea).¹

Charles I communicated Selden's doctrines to the Dutch Government, and Cromwell ordered them to be translated into English. Selden, too, did not recognize the papal decrees as constituting title to the mastery over the sea, and he rejected for that reason the Portuguese claims to the East Indian waters; but he was the more emphatic in laying claim to a natural and international law, which gave to the King of England the mastery over the seas surrounding Britain. However, he was not painfully accurate in the calculation of the exact extent of the environs. Thus the English waters found no nearer boundaries than at Cape Finisterre and on the opposite shores of America and Greenland. I can not agree with Bonfils that Selden proved himself a better logician than Grotius,² but I heartily concur with the famous Frenchman in his assertion that he (Selden) had given a strong impetus to English national consciousness.

His book bears singular testimony to the bold plan of sea domination that is being pursued to this very day with the tenacious perseverance inborn in the Anglo-Saxon and which explains the manifold encroachments, injustices, and violations on the part of England, without, however, justifying them in the least.³

A *free sea* and a *closed sea* became now for a long time the slogan of the various parties. Spanish, Portuguese, and German writers, too, played national politics and took part in this literary campaign on the side of a closed sea. Everywhere purely political products were involved, merely dressed in the garments of international law. Even the writings of Grotius—in so far as their object was concerned—were political works, but being based upon Roman law and because of their ardent desire to liberate the whole world, they gained a permanent value. Not everything that has been cited by Grotius

¹ The course of the argumentation and the contents are given by Selden himself on the back of the title page (I am using the London edition of 1636), as follows:

Libro Primo, Mare, ex Jure Naturae seu Gentium, omnium Hominum non esse Communem, sed Domini privati seu Proprietatis capax, pariter ac Tellurem, esse demonstratur.

Secundo Serenissimum Magnae Britanniae Regem Maris circumfui, ut individuae atque perpetuae Imperii Britannici appendicis Dominum esse, asseritur.

Pontus quoque serviet illi.

(In the first volume proof is furnished that neither by the laws of nature nor by those of nations is the sea the property of all mankind, but that it is susceptible to private domination or ownership, in the same manner as the land.)

(In the second volume it is asserted that the most illustrious King of Great Britain and of the surrounding sea is its master who holds it as an indivisible and perpetual addition to the British Empire.)

(The Black Sea too will eventually come under his rule.)

² Bonfils-Grah, *Völkerrecht*, p. 311. It can be only said that Selden recognized very well the weak points in Grotius' argumentation; but on the other hand, he is an expert in completely shoving into the background the lofty idea which Grotius had in mind and which was to liberate the nations of the world.

³ Loc. cit.

against the ownership, character, and sovereign capacity of the sea was able to stand the acid test of criticism.¹ The impossibility of justifying and limiting the sovereignty and likewise the inexhaustibleness of the sea are assertions that partly need to be demonstrated and are partly lacking the force of proof. But the effect of an important discovery was created when he proclaimed once more the following principle of Roman law: the sea is common property (*res communis omnium*); it is necessary to the commerce between nations and for that reason its use must be made possible for all States and nations. The proclamation of the "international character of the high sea"² constitutes an act of humanity.

Later on the absence of a "legal conclusiveness" was felt,³ it being pointed out that the presentation lacked in a "legal argumentation."⁴ Of course, the need for and indispensableness of a certain thing do not yet constitute a legal title to possession; I am not going to defend in the present work such undue haste in argumentation. But the law of nature has worked since times immemorial according to the principle to simply pass off something as a law that was worthy of becoming a law, thereby most effectively giving rise to its origin. The needfulness of the sea to the commerce of the world did not yet constitute title to the freedom of the sea, but it became the motive for its introduction. The legal title to the freedom of the sea lies solely in the consent of the States. And this consent was obtained only through the efforts of Grotius and took lasting root in Roman law, to which the world attributes readily the character of international law. The customary law of nations constitutes the legal title to the freedom of the sea. The free sea of Grotius partakes somewhat of the charm of the thought of liberation which achieved its purpose in the community of nations and in it acquired validity.

Hugo Grotius also took up the doctrine of the freedom of the sea in his principal work "*De iure belli ac pacis*" (The laws of war and peace), 1625, which gained universal recognition and won for the author the title of father of international law.

In this work he asserted:

*mare sumtum aut sub ratione integri aut sub ratione prae-
cipuarum partium, in proprium ius abire non posse.*⁵

Whereas Roman law, he goes on to say, always insisted that:

*the sea must never be seized by any nation (ne mare a populis
occuparetur).*⁶

¹ Compare particularly Stier-Somlo, p. 50 ff.

² Niemeyer, *Prinzipien des Seekriegsrechtes* (The Principles of the Rules of Naval Warfare), p. 18.

³ Stoerk in v. Holtzendorff's *Handbuch des Völkerrechtes* (Handbook of International Law), II, 485.

⁴ Stier-Somlo, p. 54.

⁵ II c. 2 § 3.

⁶ II c. 3 § 9.

The sea, we read further on, is common property (*omnium commune*), and this does not mean "common property belonging to the Roman nation" (*commune civium Romanorum*) but, as is explained by Theophus, "common property of all the people." He furthermore reminds his readers of the doctrine promulgated by Ulpian: "According to the laws of nature, the sea is open to all" (*mare omnibus natura patere*).

The contradiction between Neratius and Celsus mentioned on page 4 he explains as follows:

This contradiction disappears if we remember that Neratius is speaking of the shore only in so far as its use is necessary to the navigators or to those who sail by it. Celsus, on the other hand, speaks of the shore when seized for perpetual use, for example, for the purpose of erecting on it a permanent building; for this, as Pomponius teaches us, was obtained only by application to the judge, as also the right of building on the sea, that is to say, on the side nearest to the shore and which became, so to speak, an addition to the shore. (*Neratium de littore loqui, quatenus usus eius navigantibus aut praetervehentibus est necessarius. Celsum vero quatenus ad utilitatem perpetuam assumitur, puta ad aedificium permanens: quod a praetore impetrari solere Pomponius nos docet, ut et ius aedificandi in mari, id est in parte littori proxima et quae littori quasi accensetur.*)¹

This book of Grotius spread the doctrine of the freedom of the sea throughout the entire world.

In the freedom of the sea Grotius defended the interests of mankind against the narrow-minded national policy of the Portuguese and English. There could be no doubt as to the final victory of his principles.

In so far as England is concerned, her course was determined in this matter, as in all other cases, solely by her national interests and for that reason she even interceded occasionally for the freedom of the sea.

This selfsame England, which asserted her claim to the ownership and sovereignty over the narrow seas, declared, for example, in 1580, through the medium of Queen Elizabeth:

Neither nature nor public interest permit the exclusive possession of the sea by a single nation or private individual; the ocean is free to everybody, no legal titles exist whatever that would grant its possession to anyone in particular, neither nature nor usage permit its seizure; the domains of the sea and of the air are common property of all men.

How is this contradiction to be explained? Very easily! The above-cited words constitute the answer given by the Queen of England to the Spanish ambassador, Mandoza, when he protested

¹ Loc. cit.

against the voyage of discovery made by the English navigator Drake, who had picked a quarrel with the Spaniards in the Pacific Ocean. But at home England denied, as heretofore, the freedom of the sea and was little inclined to renounce her claims to the North Sea in the interests of the whole world. The exaggeration of the English naval policy found, however, its most emphatic expression in Cromwell's Navigation Acts of 1651 and in the English sea ceremonial, in accordance with which English vessels in the so-called royal seas for centuries were required to enforce a salute from foreign ships as a sign of English sovereignty. A change in this English policy, both in formal and in material respects, took place only after English prestige on the sea had achieved an undisputed superiority, and freedom of the sea could, therefore, harm her no longer. From now on even England did not oppose, as a matter of principle, the doctrine of Grotius whose literary activity of liberation was continued by Bynkershoek in a pamphlet, "*De dominio maris*" (The rule of the sea), which appeared in 1702. On the contrary, the English Government committed now the paradox of assuming English rule of the sea as the basis for the freedom of the sea and of making the latter appear assured through the former.

Thus it happens that up to the present day the English have failed to become completely reconciled, in reality as well as in their own minds, to the principle of the freedom of the sea. The doctrine "*Britannia rules the waves*" has become too deeply imbedded in their minds. We must, therefore, be always on the lookout for relapses, invalidations, and distortions in the interests of England. This applies above all to the purport of the principle of the freedom of the sea.

Thus, for example, during the Second Peace Conference at The Hague, the English plenipotentiary, Lord Reay, manifested a peculiar conception of this purport, when he invoked the principle of the freedom of the seas in his demand for a prohibition of the transformation of merchant vessels on the high sea, a conversion that was opposed with the utmost stubbornness by England for no other reason than because she was rich in naval bases of support.¹

The English may continue to adhere to their opinion concerning the justification and purport of the freedom of the sea, but even

¹ Protoc. III. 931. The English Delegate argued as follows: "The sea is common property and, for that reason, the Powers are allowed to forbid anything that might, perchance, become an encroachment upon their rights" (*que la mer est commune à tous et que par conséquent, les Puissances peuvent y interdire ce qui peut être une atteinte à leurs droits*). To this the following answer may be given: "It is true that the freedom of the sea must not encroach upon the rights of the neutrals. But the fact that neutral trade in contraband may, perhaps, be menaced by the sudden appearance of new warships does not constitute a violation of the law, since such a trade is not legally permitted, but rather interdicted. Even the mere possibility that the laws of hospitality may be abused does not yet place any right in jeopardy and, besides, there are various means with which to maintain this law."

England no longer dares to deny the constituent elements inherent in the principle of the freedom of the sea. The freedom of the sea, resisted by England for many centuries, has become to-day—in spite of occasional denials¹—a universally recognized legal principle imbedded in the customary laws of nations.

The consent of the States necessary to and sufficient for the customary law of the nations is restored and finds its expression above all in the covenants concerning usages on the sea, as likewise in treaties concerning straits, channels, international streams, etc., which proceeding from the principle of the freedom of the sea, elaborate it more fully.² Even all covenanted deviations from the principle of the freedom of the sea³ which may be summed up in a policing of the sea and which need not be discussed here any further, constitute additional confirmation of the law, in accordance with the principle: exceptions make a rule.

2. *The operation of the freedom of the sea.*—The sea may be used in common in accordance with private, State, and international law. The juridicial construction placed upon this public use is still a matter of scientific discussion.⁴ All attempts at construction,⁵ hitherto made, are unsatisfactory. In the first place, the doctrine “common to all” does not carry with it the principle of a mutual participation (*communio*); that is to say, it does not involve a partnership of States (community of the sea). De Lapradelle’s conception, according to which the legal representative of a league of States is to become the sovereign ruler of the sea, is entirely untenable.⁶ We will surely never get beyond the negative certainty that public use excludes every special privilege. But on the affirmative side the juridicial perfection and a legally elaborated type are missing. The Romans merely acted upon the same principle as that involved in the simple right of the user to protection against molestations; they instituted in such cases an action for personal injury (*actio iniuriarum*); and international law treats the public use just like all other basic rights, as, for example, the so-called law of honor, against violations of which one has the right to defend himself by means of force.

¹ Stier-Somlo, “Die Freiheit der Meere und das Völkerrecht,” 1917, pp. 1 ff., 30, 40 ff., 58.

² Cp. F. Perels, “Das internationale öffentliche Seerecht,” p. 88.

³ Cp., for example, Ullmann, VR. 2. A., p. 329 ff.

⁴ Bonfilis-Grah, Völkerrecht, pp. 319–326.

⁵ Such constructions will be found in Radnitzky, “Meeresfreiheit und Meeresgemeinschaft” [Archiv für öffentliches Recht, vol. 22 (1907) pp. 416–447]. Compare also Gellmann, “Das Staatsgebietsrecht,” Grünhut’s Zeitschrift für das Privat—und öffentliches Recht, vol. 41 (1915), pp. 177–274; furthermore, “Meeresfreiheit im Kriege” (Oesterreichische Zeitschrift für öffentliches Recht, vol. 2 (1915–16), pp. 656–705). And again Radnitzky, “Die rechtliche Natur der Meeresfreiheit” (Oesterr. Ztschrift. für öffentliches Recht II (1915–16), pp. 706–707.

⁶ Le droit de l’Etat sur la mer territoriale” in Revue générale de droit intern. public, vol. 60, pp. 283, 309.

Freedom of the sea means above all freedom of navigation, of fishing, and of laying cables on the high sea.¹ The center of gravity lies in the freedom of navigation. And in this connection it must be emphasized in accordance with Roman law: It is not sufficient that every man and nation may travel on the sea, they must likewise be able to effect a landing.²

But a powerful obstacle has arisen here lately; the harbor is actually regarded as a part of the mainland,³ and the public use of the coast, legal according to Roman law, is replaced to-day by the sovereignty of the coast state with its attending legal power to close the port.

Against this there exists but one remedy. Since times immemorial international intercourse had to reckon with obstacles on the part of states that were overcome, first, in a simple though unequal matter-of-fact way, next, through a more or less consistent though firmly established usage, and, finally, through treaties between states.⁴ Consequently, a general agreement is needed that would reconcile territorial sovereignty with the demand for the freedom of the sea and which would effect the operation of the latter through a lasting change of the former.

Freedom of the seas without the basic right to the utilization of coasts and ports is a contradiction in adjecto. Freedom of the seas endeavours to turn the seas into roads of communication⁵ for mankind and to grant the opportunity for oversea trade and commerce. And this purpose asserts itself especially and in a most conspicuous manner in all landing places. A freedom of the sea that limits vessels to voyages forth and back on the high sea and at the same time closes the ports to them, would be perfectly aimless. The sea would eventually become the natural graveyard for all vessels.

The shore constitutes the basis for the domination of the sea. The ruler of the coast is likewise the logical master of the adjoining sea. And if such a sea domination is not acceptable, then an effective restriction must be placed upon the authority over the coast. The port authorities and the rulers of the coast must not abuse their territorial sovereignty, they must place to the vessels in their ports no other obstacles in the matter of admission and sojourn save those

¹ "But nevertheless we feel at the same time the lack of a basic comprehension of this problem," van Calker (*Das Problem der Meeresfreiheit*), p. 12.

² Stier-Somlo, too, emphasizes (p. 59) that the freedom of the sea has but one meaning, if "besides the mere travel on the surface of the water it is to grant unhampered commerce and the opportunity to utilize for purposes of commerce and navigation all bases of support and the ports and their facilities that lie on the highways of the sea."

³ *Annuaire de l'Institut de droit international*, vol. 16, p. 189; vol. 17, p. 274.

⁴ Compare my pamphlet, "*Luftschiffahrtsrecht*" (*The right of aerial navigation*), p. 9.

⁵ Bonfils-Grah, *VR.* p. 309: "the world sea is the great highway and is owned by all nations in common."

that are required by the compelling considerations of self-preservation. To be sure, the basic right to self-preservation need not give way to the principle of the freedom of the sea.¹

If the mere legal obligation towards international commerce and, through it, the demand for intercourse within the boundaries are derived from the leading principles of partnership of states and of international law, without jolting at the same time the rights of territorial sovereignty (the right of revenue, prohibition of exports, banishment, compulsory passports, etc.),² then how much more necessary will it be to insist upon communication beyond the boundaries of the sea, especially since international law recognizes the sea explicitly as a highway linking the nations together, without interfering in the least with any of the territorial rights that are needed to the preservation of the self-interests?

The conceptual jurisprudence, permitting the flapping of wings only in a cage built by her own hands, emphasizes, indeed, that freedom of intercourse does not by any means signify freedom of entry. It may be granted to the pure formalist that, literally speaking, the freedom of traffic on the streets of the city is not yet interfered with, if the property owners keep their doors closed; but whoever looks for facts beyond words will perceive that freedom of the streets and freedom of traffic are perfectly senseless, as long as the houses remain closed to the traffic. Though perhaps the concept of the freedom of traffic may not demand its full operation at least requires a basic right of access, respectively a right of effecting a landing, of course under maintenance of the house or state authority to preserve the self-interests. And if this is not quite clearly expressed in the existing laws, then it simply must be remedied.

Already the spirit of the Roman law of the later period demanded a reconciliation between State sovereignty (*imperium*) and public use (*usus publicus*). Sovereignty is originally a legal title to the preservation of the interests of the coast States, particularly of their safety; but beyond this the entrance and departure of ships must not be interfered with.

If the principle of the freedom of the sea or the doctrine of "common property" (*commune omnium*) are not eventually to resolve themselves into an empty principle, as far as ships are concerned, then they must under no circumstances be left to the arbitrary will of the local state authorities. If the seas are to remain the highways of international traffic, then the demand for the entrance of a ship into foreign ports must be made possible as a matter of principle.

¹ Compare also F. Perels, "Das internationale öffentliche Seerecht der Gegenwart," 1882, p. 88.

² v. Liszt, VR. § 7 Z IV.

Even Grotius granted that bays and minor parts of the sea are subject to the right of occupation,¹ or, to put it differently, constitute territorial and sovereign waters, respectively. Nevertheless he stated:

This much is certain: Even he who shall have seized the sea, may not interfere with defenceless and harmless navigation, because even on land such a passage cannot be prohibited, although it is usually less necessary and more harmful. (*Illud certum est, etiam qui mare occupaverit navigationem impedire non posse inermem et innoxiam, quando nec per terram talis transitus prohiberi potest, qui et minus esse solet necessarius et magis noxius.*)²

There arises now the question of the right of hospitality as a sharply defined postulate; the logical and unavoidable result and effect of the freedom of the sea. I have just finished a separate pamphlet, "The Law of Hospitality in War and in Peace," which will be published by Springer. For the moment, however, I will only say this: The prevailing doctrine is too much still under the influence of the principle of sovereignty. The harbors are territorial waters, indeed; and even in the dispute concerning the legal nature of territorial waters, I accept the territorial sovereignty of a coast State.³ But the full operation of the principle of the freedom of the sea, too, demands that freedom of the sea and territorial sovereignty over the coast must act in full accord. As for straits and channels, there exist already in a large measure covenanted, though inadequate, restrictions insuring freedom of intercourse; in like manner, the freedom of commerce on international streams has been reconciled through mutual agreements with territorial sovereignty. Furthermore, the right of a free passage for merchant ships in coastal waters ("*ius passagii sive transitus innoxii*," "*droit de passage inoffensif*") is generally accepted,⁴ but the right of entrance into a port is still menaced by the principle of sovereignty which can exercise every sort of arbitrary will.⁵

¹ II c. 3 § 8.

² II c. 3 § 12. Compare also Vattel II c. 9 § 126: "Thus the sea even in its occupied parts must remain open to all navigation. Consequently, he who has possession of it ought not to refuse passage to a vessel, from which he has nothing to apprehend. However, it may happen accidentally that its owner will refuse rightly such unlimited use." (Ainsi la mer, même dans ses parties occupées, suffit à la navigation de tout le monde; celui qui en a le domaine ne peut donc y refuser passage à un vaisseau, dont il n'a rien à craindre. Mais il peut arriver par accident que cet usage inépuisable sera refusé avec justice par le Maître de la chose.)

³ Compare "*Luftschiffahrtsrecht*," p. 5 ff.

⁴ Cp. "*Luftschiffahrtsrecht*," p. 5 f; von Ullmann, VR. 291; Liszt, VR. 90; von Perels, "*Das internationale öffentliche Seerecht*," p. 212; Schücking, "*Das Küstenmeer im internationalen Seerecht*," p. 31; de Lapradelle, "*Le droit de l'Etat sur la mer territoriale*," p. 25; Frenzel, "*Die Theorie über die rechtliche Natur des Küstenmeeres*" (Dissertation of the University of Leipzig), 1908, pp. 18, 52; *Annuaire de l'Institut de droit international*, vol. 12, p. 132 ff., vol. 13, p. 305.

⁵ De Lapradelle, "*Le droit de l'Etat sur la mer territoriale*," 1898, p. 21, states: "This free access is merely tolerated reciprocally, it is by no means a right" (ce libre accès n'est qu'une tolérance réciproque; ce n'est pas un droit.) Llepmann, "*Der Kieler Hafen im Seekrieg*," p. 138 f., declares: "Not international law, but the rights of territorial sovereignty and the maritime police force, will have the last say in these regions."

It is, indeed, a sign of the conservative nature of international law, when it is considered that only in treaties relating to navigation, colonization, and friendship, certain ports of conservative States have been opened to foreign vessels¹ and that, generally speaking, only the precepts of courtesy and usage regulate the hospitable intercourse between vessels. Already Grotius² and Vattel³ have pointed out the way to a conciliation between State and international law, by proclaiming the principle that a coast State may prevent the entrance of a foreign vessel, and respectively place restrictions upon it, solely for the purpose of averting a danger menacing its own safety. The Institute of International Law, too, made an attempt to effect a much desired reform along these lines.⁴ But the exalted conception of the principle of sovereignty, in addition to the distortion of the idea of neutrality during war, have stood thus far in the way of a rational law of hospitality.

The whole of international law as it exists to-day is altogether based upon a too one-sided conception of the principle of sovereignty. A clearer elaboration of the point of view of international law, which demands recognition and perfection on the basis of mutual agreement, constitutes the question of the future.

§ 2. THE PRINCIPLE OF THE FREEDOM OF THE SEA IN TIMES OF WAR, ITS VIOLATION, AND THE PROBLEM OF ITS RESTORATION.

I. According to international law, as it exists at the present time, the freedom of the sea is not abolished, it is merely restricted; with the exception of these limitations freedom of the seas still exists in a full measure.

Above all there exists no freedom of the sea for merchant vessels on the scene of action; on the contrary, a merchant vessel enters this zone upon its own responsibility.⁵ The guns of battleships need not remain silent, even if "neutral" Americans appear occasionally among the hostile naval squadrons, although the former, according to Wilson, "are entitled to travel wherever lawful business on the sea calls them."

¹ Compare, for example, Perels, "Das internationale öffentliche Seerecht der Gegenwart," 1882, pp. 96, 99 ff.; Strupp, *Urkunden*, I 82, 347.

² *De iure belli ac pacis* (The Laws of War and Peace), 1625, II c. 3 § 12.

³ *Le droit des gens*, 1758, II c. 9 § 126.

⁴ Compare "Annuaire de l'Institut de droit international," vol. 17, p. 274 (art. 3).

⁵ Schücking (*Der Dauerfriede*, p. 54) who regards the open sea as belonging to no one in particular (see above p. 5, note 3) but who would like to see it become a common property, so that the realization of the freedom of the seas may become an accomplished fact, states: "As soon as the sea is declared common property (*res commune*), the neutrals will be in a position to demand, in a future war on the sea, that all acts of war on the high sea be discontinued entirely." But just as a merchant vessel can not say in times of peace "make room for me" (*ôte-toi que je m'y mette*), so likewise shall a neutral vessel in war times not be in a position to hamper the battleships in their war activities.

But even outside of the zone of combat exist restrictions of the freedom of the sea. Thus, for example, freedom of traffic for merchant ships of the belligerents is restricted on account of the right of capture at sea, while, on the other hand, the right of blockade, including the right of placing mines and the law of contraband, limit the freedom of commerce of even neutral merchant vessels.

Thus three authorities assert themselves on the sea. In so far as their power extends, the freedom of the sea and through it the over-sea trade of the belligerents as well as of the neutrals ceases to exist.¹ But outside of these three spheres of domination freedom of the sea exists, and even the authorities themselves are not absolute; they are limited. Wherever the laws of capture, of blockade, and of contraband prohibit the seizure of ships and of their cargoes, respectively, the principle of the freedom of the sea goes into effect, unrestricted even within the three spheres of domination.

Still the principle of the freedom of the sea is hit hard and in a perfectly legal manner by the three exacting masters, so hard, indeed, that serious doubts have arisen whether it is altogether possible to speak of a freedom of the seas and not rather of a freedom for the sea rulers.² And yet we have the privilege of stating emphatically that the threefold mastery of the sea has its limitations. Verily the following sneering words of Mephistopheles in "Faust" may be cited in this connection:

War, commerce, and piracy,
They are triune, inseparable.

It will be well to bear in mind that, according to existing laws, maritime warfare is nothing but a commercial warfare and the "piracy" of it makes its appearance in the so-called "unholy trinity" mentioned by Niemeyer.³ Whether and to what extent we enjoy freedom of the sea during war depends mainly upon the legal restrictions that are imposed upon the three exacting masters. It will have to be admitted that, within the confines of these laws, the rights of capture at sea, of contraband, and of blockade signify in themselves a smooth rejection of the freedom of the sea.⁴ When

¹ Liepmann, "Die Freiheit der Meere" in the Deutsche Juristen-Zeitung, 1917. Nos. 21-22, Sp. 923.

² Niemeyer, "Die Prinzipien des Seekriegsrechts," 1909, p. 15 states: "If we wish to be honest, then we must admit that the main purpose of our regulations does not lie in the restrictions imposed by the (Paris) Declaration upon the arbitrary will of war, but in the recognition accorded to exorbitant war privileges. These privileges find their highest expression in the following unholy trinity: right of capture at sea, right of contraband and right of blockade. The right of capture at sea sanctions the brutal treatment of private property; the rights of contraband and of blockade accord the same treatment to neutral commerce. The restrictions contained in the Declaration consist in reality in the exclusion of privateering, in the immunity of enemy goods on neutral vessels, and in the demand for effective blockades."

³ Compare also Triepel, "Die Freiheit der Meere," 1917, p. 16.

⁴ Loc. cit., p. 11. Similarly van Calker, pp. 18, 24. Stier-Somlo, p. 77 f.

hostile merchant vessels may be brought up as prizes by the enemy, when ports may be closed even to neutral ships and their contraband cargoes confiscated, even without the existence of an actual blockade, then such acts constitute a direct contradiction of the principle of unhampered commercial intercourse on the seas. It was, perhaps, for this reason that Lord Cromer,¹ too, saw "in the chattering about the freedom of the sea nothing but a meaningless and misleading phrase, a euphemistic expression for the destruction of English sea rule, which had proven a blessing to the entire world" (!!). Let England enjoy her own complaisance. I merely wish to state that this rudeness directed equally against Germany and America has missed its aim. For, in the first place, as has been said before, freedom of intercourse and of trade exists far from the zone of combat and beyond the rights of capture, of blockade, and of contraband; and, secondly, these three laws have limitations that in turn prove to be elements of freedom. The essence of right asserts itself particularly in the restraints which it imposes upon might; and whoever demands freedom of the sea within the boundaries of the present law merely wishes to state in other words that: Each Power is required to yield to the limitations imposed by the rights of capture at sea, of contraband, and of blockade. There exists a *law of naval warfare serving as a legal restraint upon warfare on sea* that simply may not be violated with brutal disregard. Hence, the demand for freedom of the sea in war means that these limitations are to be respected, so that commercial intercourse may be assured of its somewhat legally restrained freedom of movement. In this manner these restrictions serve as a basis for the rights of capture at sea, of contraband, and of blockade,² and eventually constitute the main purport of the principle of the freedom of the sea in times of war, according to binding law. Whether this is sufficient is a politico-legal question which we shall take up later on.

II. But England and the Entente Powers have placed themselves in sharp opposition to the freedom of the sea as accepted by existing laws.³ In the course of the present world war, our opponents have abolished the freedom of the sea completely. The restrictions imposed by the rights of capture at sea, of contraband, and of blockade, including the law of neutrality, were swept aside and the oversea commercial traffic closed in the main or, rather, compelled to perform auxiliary services for the Western Powers. They pay no longer the slightest attention to the restrictions imposed by the right of

¹ London Times, May 30, 1916.

² Compare my article "England-Amerika und das Völkerrecht," p. 3 (Bulletin of the University of Frankfurt, Special Edition, dedicated by the Royal Julius-Maximilian University of Würzburg to its students in the service, offered for sale by the bookstores in 1917).

³ See particularly Heinrich Pohl: "England und die Londoner Deklaration," 1915, and also "Englisches Seekriegsrecht im Weltkrieg," 1917.

capture at sea, in direct violation of the Paris Declaration concerning the laws and customs on the sea; they even seize enemy goods sailing under a neutral flag, and they deprive the mails transmitted through enemy ships of the privilege of inviolability.¹ But these are after all acts of war that are directed against the enemy, and in such cases one must always expect violations of this sort.

However, the Entente Powers have also destroyed the effect of the whole neutrality law on the sea. Not only was the protection guaranteed to neutral ships and to neutral merchandise by the Declaration of Paris concerning the principles of maritime law abolished, not only were German passengers removed summarily from neutral vessels, but our opponents have also strangled the commerce of the neutral nations, in spite of the fact that, according to the Declaration of Paris concerning the principles of maritime law, this is to remain free in times of war, being only subject to the restrictions imposed by the laws of contraband and blockade.² These two legal systems were pushed forward, but simply turned topsy-turvy; and in this way, within a very short time after the closing of the North Sea by the English (November 3, 1914), the freedom of the sea resolved itself into a complete state of piracy. The program of Mephistopheles had come to a realization.

Unfortunately the neutral nations were not united nor sufficiently powerful to force England back into the path of right and justice. Because of this toleration of injustice on the part of the neutral nations, Germany's interests were seriously impaired, and Germany was forced to adopt a policy of self-preservation. However, in order to guard her own interests as well as defend those of the neutral nations, she has never ceased to point out the only way that could lead back to the path of right and justice. Germany never tired of shouting time and time again amidst the general chaos the words which—if followed—would have meant the salvation of the neutral nations: *Freedom of the sea!*

England's present warfare brings to our recollection the severe arraignment pronounced as early as 1857 by Lord Derby, himself an Englishman:

The history of maritime law, of maritime injustices, stands as an indelible testimony to the boundless selfishness and greed of the English nation and its Government.

A continuation of the arraignment is furnished by Octavio in "Piccolomini":

Just this is the curse of an evil deed,
That it must constantly produce evil.

¹ Similarly, the mail packages found on neutral vessels and belonging to neutral countries, are not accorded a better treatment.

² Loreburn-Niemeyer, "Das Privateigentum im Seekrieg," p. 103.

III. The restoration of the freedom of the sea was and remained the main object of German policy.

As early as August 19, 1915, the Imperial Chancellor von Bethmann Hollweg declared during a speech before the Imperial Parliament:

We must obtain the freedom of the seas, for our own protection as well as for the protection and salvation of all nations.

The question of the freedom of the sea played also a prominent part in the exchange of notes between Germany and the American Union. The German note of July 8, 1915, in particular, pointed to the fact that ever since Frederick the Great, on the 10th day of September, 1785, signed jointly with John Adams, Benjamin Franklin, and Thomas Jefferson the friendly and commercial agreement between Prussia and the western Republic, German and American statesmen have always stood side by side in the contest for "the freedom of the seas and for the protection of peaceful commerce"; and the Imperial Government expressed the positive hope "that at the conclusion of peace, or even perhaps sooner, it may be possible to regulate the usages of naval warfare in such a way as to guarantee and insure the freedom of the seas." At that time the active support of the American Union was still expected, and for that reason, the German note went on:

The Imperial Government will always avail itself gladly of the kind services of the President and it entertains the hope that his efforts in the present (*Lusitania*) case, as well as those on behalf of the lofty ideal of the freedom of the seas, may eventually lead to an understanding.

In the *Sussex* note of May 4, 1916, too, Germany once more demanded the "restoration of the freedom of the seas." In a similar manner, the Imperial Parliament pledged itself to this principle by declaring, in its resolution of July 19, 1917, "the freedom of the sea must be insured." And, finally, the Pope, too, mentioned in his letter of August 1, 1917, addressed to the chief magistrates of all belligerent nations, the security of the freedom of the seas among the points regarded by him as the basis for a just and lasting peace.

If words are to be trusted, Germany had a right to rely upon the active support of the Union Government; for that Government professed in its note of July 23, 1915, the principle "that the high sea is free." It declared, furthermore:

The Government of the United States and the Imperial German Government are fighting for the same high ideal; for a long time these two Governments have contended side by side for the recognition of just those principles upon which the Government of the United States now so solemnly insists; both are fighting for the freedom of the seas. The Government of the

United States will continue to fight for this freedom without compromise and at any price, regardless of which side may be violating it.

In order to initiate the carrying into effect of this principle, President Wilson even demanded, in a speech delivered on May 27, 1916, before the League to Enforce Peace:

A general association of nations for the purpose of maintaining intact the security of the highways of the sea for the joint unhampered use of all nations of the world.

Pure dissimulation! The answer which the Swedish Government sent to America on February 9, 1917, and which rejected curtly the American imputation made to all nations that they break relations with Germany, contains the following scornful passage:

For the purpose of achieving practical results and of maintaining the principles of international law, the Government (of Sweden) had addressed itself several times to the neutral powers, with the object in view of arriving at a cooperation in the above-mentioned aim. The Government did not fail especially to lay proposals for that purpose before the Government of the United States. To its regret, the Royal Government has learned *that the interests of the United States* do not permit them to join in these proposals.

In reality America defended the freedom of the seas only against Germany, but not against England, although the latter began the violations, thereby forcing Germany to adopt counter measures.¹ American interests in the world war since its very inception were parallel with the interests of England, whose silent partner the Union was, until finally she threw off the mask and declared war against Germany.

This much has become indisputably clear: A "liberation of the seas of the world," a "restoration of the freedom of the sea" during the duration of the war, has become impossible owing to the attitude of America which, nevertheless, likes to boast continuously of being the guardian of international law. For that reason, to repeat a phrase of the German note of July 18, 1915, the question of the restoration of the freedom of the sea will have to be taken up with greater insistence "*as soon as peace is concluded.*"

In the 10th edition of his book "International Law," which appeared during the war in 1915, v. Liszt states (p. 4):

Already to-day we are confronted with the problem of the freedom of the sea as constituting one, and, perhaps, the most important object to be achieved. It constitutes the main object of the conflict. Sooner or later it will become the most valuable prize of victory.

¹ The American weekly, "The Fatherland" (August 11, 1915), declares justly: "But if the freedom of the seas is in danger, why do we not defend it against Great Britain?"

IV. *How is the restoration of the freedom of the sea to take place? How are its form and contents to be understood?*

In the first place, it will become necessary to refrain from promulgating the freedom of the sea as a mere principle. I stated already in another connection: "Principles must not hold monologues in legislation, but ought to come to life in concrete regulations; they ought to be felt and not heard. Let us, therefore, have no disputes about principles, but a real reconciliation of contradictory postulates."¹

It will also be necessary to refrain from the mere promulgation of the freedom of the sea as a principle, owing to the fact that up to the present time everybody understands something else by freedom of the sea. The newer writings on the freedom of the sea have proved this beyond the shadow of a doubt.²

Up to the present time "freedom of the sea" has remained merely a political slogan—in the same manner as in their time "liberty, equality, brotherhood"—whose recruiting power lies just in its indefiniteness that permits everyone to understand by it whatever he chooses. It is also quite possible that some understand by it nothing at all, being merely intoxicated with the sweet sound of the phrase.

If the political slogan is to be translated into legislative action, then we must come to an understanding concerning the substance; and I agree with Triepel³ that it would be highly desirable to dispel the mist with which the slogan had been surrounded by us, intentionally or unintentionally.

What purport shall we give, then, to the freedom of the sea at the conclusion of peace? I disregard freedom of the sea in times of peace which ought to be elaborated and guaranteed particularly through the security of the law of hospitality. I confine myself to freedom of the sea in times of war. Would the status quo ante suffice in this case; are we to demand a freedom of the sea merely within the confines of the present rights of capture at sea, of blockade, and of contraband, and which are consequently merely to be guaranteed anew? Or is a simultaneous extension of the present legal restrictions intended? Or are we even going to demand eventually the absolute abolition of these three laws?

¹ "Luftschiffahrtsrecht," 1909, p. 7.

² Compare particularly in this respect: Gellmann, "Meeresfreiheit im Kriege" (Oesterreichische Zeitschrift für öffentliches Recht, II, 1915, p. 657 ff.); Edwin Katz, "Die Freiheit der Meere im Kriege," 1915; v. Schulze-Gaevernitz, "Freie Meere" ("Der deutsche Krieg," No. 32), 1915; W. v. Siemens, "Die Freiheit der Meere," 1917; Heinrich Triepel, "Die Freiheit der Meere und der künftige Friedensschluss," 1917; W. van Calker, "Das Problem der Meeresfreiheit und die deutsche Völkerrechtspolitik," 1917; F. Stier-Somlo, "Die Freiheit der Meere und das Völkerrecht," 1917; Adolf Grabowsky, "Die Freiheit der Meere" (in "Das neue Deutschland," 5th Year, 1917, No. 17, p. 449 ff.); Neumann-Frohnau, "Die Freiheit der Meere," 1917; Llepmann, "Die Freiheit der Meere" (in Deutsche Juristenzeitung, 1917, Nos. 21-22, Sp. 922 ff.) v. Pflug-Harttung, "Der Kampf um die Freiheit der Meere," 1917.

³ p. 7. Compare also Neumann-Frohnau, "Die Freiheit der Meere," p. 38.

In a speech delivered at Birmingham in December, 1917, the former English Prime Minister, Asquith, made the following confession concerning the freedom of the sea:

I have endeavoured in vain to find an exact though only approximate definition of the concept of this phrase.

It is true that "freedom of the sea" remains for the time being still an indefinite phrase. However, a summary does not exhaust the subject; this can be explained by the law only. In the same way only an international agreement intended to guarantee the freedom of the sea will be in a position to define its substance more accurately.

When the Papal letter addressed on August 1, 1917, to the chief magistrates of all belligerent nations pointed out the security of the freedom of the seas as constituting one of the basic elements of a just and lasting peace, an editorial in the *Frankfurter Zeitung* declared rightly:¹

The demand for the freedom of the seas, too, put forward in this note, but not defined, may be counted among the problems that permit and render possible a double interpretation and that achieve substance only through negotiations.

The *Post*, too, declared:

Freedom of the seas is certainly a phrase that is heard gladly in Germany. It will remain, however, an empty phrase as long as no definite specifications are made, stating how this freedom is to be restored and maintained.

The letter of the Pope already pointed out that the freedom of the seas must be made secure "by means of *regulations that are to be enacted in the future.*" The question now remains, What sort of regulations shall be established?

Asquith looks apparently with displeasure upon the forthcoming discussion of this problem. He feels that sea-mighty England will have to accept hateful restrictions and stipulations.

Wilson, in his optimism concerning international matters, regards the whole problem as easy and simple. In a speech before the Senate he declared first that "a somewhat radical reconsideration of many of the rules of international practice hitherto thought to be established may be necessary in order to make the seas indeed free and common in practically all circumstances for the use of mankind." And then he added:

It need not be difficult either to define or to secure the freedom of the seas if the governments of the world sincerely desire to come to an agreement concerning it.

However, it ought to become clear at once during the negotiations that the hostile interests of the governments are stronger than their desire for an agreement. But inasmuch as Sir Edward Grey, too,

¹ Issue of August 17, 1917, No. 226, evening edition.

has declared his willingness to make, after the war, freedom of the sea the subject of "conferences, definitions, and agreements,"¹ it is highly necessary to arrive at an earliest possible opportunity at a clear understanding concerning further developments.

Since Germany values the freedom of the sea so highly that, like the Pope, she wishes to have it included even in the program of the peace conference, then it is certain, indeed, that she would like to see once more the breaking up of the absolute power of the "unholy trinity" that had been developed by the English method of conducting naval warfare. As for the question whether the German Empire would be satisfied with a restoration of the agreements to their former status or with a renewal of the old principles of maritime warfare, respectively—and the expression "restoration" would seem to point toward such a possibility—or whether it would make more far-reaching demands, can not as yet be foreseen; however, the latter eventuality may be expected. It may be questioned with Triepel² whether a declaration made by our enemies to the effect that the old international law shall remain unchanged for the time being will serve the best interests of any nation.

Some demand that the same rules be applied to warfare on land and to warfare on the sea, and that, accordingly, the rights of capture at sea, of blockade, and of contraband be abolished entirely. Thus we would have the same freedom of the sea in war as in times of peace. This constitutes the maximum program of the freedom of the sea in times of war and is represented above all by Meinecke; for he demands:

The abolition of the right of capture in maritime warfare, and, wherever possible, also the abolition of the rights of contraband and of blockade, in order to choke off the former at its very source.³

According to this, the freedom of the seas is to be restricted only by conflicts on the sea. The fleets have no other task save to destroy enemy battleships and coast defenses, and are, therefore, placed in the main on an equal footing with the land forces. Naval warfare no longer presents any special aspects.

This plan was proposed before the war already by the former English Lord Chancellor, Earl Loreburn.⁴ After a very searching and minute justification he states:⁵

We will appeal in vain to the conscience of the civilized world, as was done so eloquently by our delegates at The Hague,⁶

¹ Concerning the opposition met by Grey in England, compare Stier-Somlo, "Die Freiheit der Meere," p. 22.

² "Die Freiheit der Meere," p. 11.

³ "Die Arbeiterschaft im neuen Deutschland," p. 29.

⁴ "Das Privateigentum im Seekrieg" (Translated into German by Niemeyer in 1914).

⁵ Loc. cit., p. 149. Compare likewise pp. 162-168.

⁶ Loreburn refers to the negotiations concerning the placing of mines.

as long as we consider it our basic right to wage war against commerce, to blockade unfortified cities, and to destroy the industries of the civilian population. We may pay heed to soldiers and sailors who, having experienced on their own bodies the dangers and hardships of warfare, advocate (and this occurs rarely enough) severe measures for which they are perfectly willing to assume the responsibilities. Statesmen are in a different position.

To be sure, Loreburn is willing, as we shall see later on, to make, if necessary, certain concessions to the principle of contraband, but he demands that the right of capture at sea and the right of blockading the commerce shall be abolished under all circumstances.

In Germany, too, minimum programs are being proposed, but these disagree, of course, on the question concerning the nature of the potential concessions.

Wehberg hopes for "the abolition at an early date of the right of capture at sea under the leadership of America,"¹ as well as for an "agreement in the sense of an abolition of the right of contraband along the lines of a further development of the law of maritime warfare." "In due time," says Wehberg, "this radical reform cannot be avoided."² Liepmann, too, desires the abolition of the rights of capture at sea and of contraband.³

An article in the issue of the *Frankfurter Zeitung* of September 12, 1915, advocated the inviolability of private property in maritime warfare,⁴ but made the following reservation:

only the conception of contraband in its sense, restricted in accordance with the standards of fairness, as likewise the establishment of a lawful and effective blockade, may impose restraints upon the freedom (of the seas).

Inversely Niemeyer, in a pamphlet published before the world war,⁵ comes to the conclusion:

that the unrestricted use of all proper means including the right of capture at sea, but not the application of those juridical substitutes for weapons which enlist the unjustified sympathy of the neutral nations, is compatible with the principles of the law of maritime warfare; those legal substitutes are: the theory of a continuous voyage and the conception of contraband of war.

Kurt Perels, too, is emphatically opposed to the abolition of the right of capture at sea.⁶ On the other hand, others demand nothing else but the abolition of the right of capture at sea.⁷

¹ "Seekriegsrecht," 1915, p. 255 f.

² Loc. cit., p. 122.

³ *Deutsche Juristenzeitung*, 1917, Nos. 21-22, Sp. 926.

⁴ Similarly Nöldeke (*Deutsche Juristenzeitung*, 1915, Sp. 373 ff.).

⁵ "Prinzipien des Seekriegsrechtes, 1909, p. 31.

⁶ "Der Kampf um das Seebeuterecht. Rückblicke und Ausblicke" in *Deutsche Rundschau*, 1915, p. 161 ff.

⁷ For example, Neumann-Frohnau, p. 39.

But in contrast to these divergent plans of reform there are also international jurists who still refuse to believe altogether in the possibility of a change.

Just as in 1913 Schramm assumed that the rights of capture at sea, of blockade, and of contraband "will not disappear from state laws for an incalculable time,"¹ so is likewise Triepel² of the opinion to-day that:

the incessant abolition of the laws of contraband and blockade is an utopy, while the abolition of the right of capture at sea without the simultaneous abolition of contraband and blockade would not only constitute an empty performance but also an innovation detrimental to German interests.

Stier-Somlo takes a similar attitude.³ He regards the downfall of the three maritime tyrannies possible only "under the supposition that maritime warfare will be prohibited, or, in other words, in the era of eternal peace."⁴

Whereas Schücking⁵ considers the freedom of the seas as being insured only by a world-wide organization, and, after the pattern of Vollenhoven⁶ and R. Erich,⁷ by an international police force and a federal navy capable of enforcing orders, Stier-Somlo regards the system of a balance of power as the sole security for justice and peace.⁸

A settlement, if at all possible, can be effected only after a thorough examination of the details of the usages of naval warfare or else through a recognition of the three systems of authority.

As long as it was possible to turn freedom of the sea into an absolute tyranny of the sea, it is and must also be inversely possible to effect and to guarantee the security of freedom of the sea. The problem of the freedom of the sea in times of war falls into several separate problems.

Out of this complication of problems there arise sharply defined individual programs. And just as many distinct programs come into existence as there are points, where the freedom of the sea in times of war is partly menaced and partly protected by the peculiarities of the laws of maritime warfare. At the same time we must always bear in mind that, according to Loreburn,⁹ the three systems of authority are closely interrelated and that consequently the whole

¹ "Prisenrecht," pp. 119, 208, 214.

² "Die Freiheit der Meere und der künftige Friedensschluss," 1917, p. 15 f. See also p. 35 f.

³ "Die Freiheit der Meere und das Völkerrecht," 1917, pp. 96, 103, 110, 119.

⁴ p. 112.

⁵ "Der Dauerfriede," p. 55 ff.

⁶ "De Eendracht van het Land," 1913.

⁷ "Das Problem einer internationalen Polizeimacht," *Zeitschrift für Völkerrecht*, VII. 303 ff.

⁸ "Die Freiheit der Meere," p. 119 ff.

⁹ Loreburn-Niemeyer, "Privateigentum im Seekrieg," p. 154. Similarly Triepel, p. 16.

question must not be discussed "so to speak within water-tight bulk-heads."

The detailed elaboration of a "system of regulations" that would insure and develop further the principle of the freedom of the sea will, perhaps, take place only at a peace conference which presumably will follow soon upon the heels of a conclusion of peace. It may be possible, however, to even formulate the authoritative principles as constituting conditions of peace or at least, as was done at the conclusion of peace in Paris in 1856, to group them into a new declaration of the maritime law. The detailed perfection, in so far as such may be still desirable, could then be easily left to a future conference.

CHAPTER I.

THE RIGHT OF CAPTURE AT SEA.

§ 3. THE PAST AND THE PRESENT.

The greatest divergence of the present laws and customs of war on land and on the sea lies in the importance that is attached to private property. Private property is protected in warfare on land as a matter of principle,¹ but is exposed in maritime warfare to the right of capture.

I. In this way the present world war, too, stands largely under the influence of the right of capture at sea. To be sure, Italy proclaimed in its merchant marine code the principle of protection for private property in maritime warfare, but abolished this clause upon her entrance into the war.

Consequently, the practice of capture at sea is lawful, according to international law hitherto binding.

But the right of capture at sea has its legal restrictions, and these were simply brushed aside by England.

In the first place the Paris Declaration of 1856 of the principles of maritime law comes into consideration, according to which enemy goods sailing under a neutral flag are to be immune from confiscation. In 1856 the English accepted the principle: "The flag covers the cargo," only with deep reluctance, remained inwardly opposed to it, and threw it overboard at the present time as a mere "scrap of paper."

Moreover, three agreements of the Second Peace Conference at The Hague were constantly violated.

1. The (VI) convention regarding the treatment of the enemy's merchant ships at the outbreak of hostilities² contained, in Article 1, a recommendation for the granting of a respite for unmolested departure to those merchant vessels that were caught unawares in an enemy port by the outbreak of the war. England knew well how to circumvent the adoption of this recommendation in the form of a legal obligation.

¹ Hague Convention concerning the laws and customs of war on land, Articles 23g, h, 28, 46, 47. For exceptions and special cases, respectively, see Articles 48-56.

² See Pappenheimer, "Die Behandlung der feindlichen Kauffahrteischiffe bei Ausbruch der Feindseligkeiten" (Dissertation of the University of Würzburg), 1911.

Accordingly, Germany promised in her declaration of war against France (Aug. 3, 1914) the release of all enemy vessels lying in German ports, provided complete reciprocity would be guaranteed within 48 hours.

But the English recognized neither the principle of respite nor the agreement concerning the Suez Canal.¹ All ships of the Central Powers that were caught in the ports of Port Said and Suez were driven out into the sea by the English forces of occupation and captured by English ships that lay in wait for them. As for the steamers lying in English ports, England herself had prepared for them a trap in the form of Article 5 of the Hague Convention. For, Article 5 excludes from the operation of this agreement such merchant vessels "whose construction makes it apparent that they have been intended for transformation into warships."

And what construction has England placed upon this definition? The Order in Council of August 4, 1914, simply understands by it all vessels of over 5,000 tonnage and of a speed of at least 14 knots, or, in other words, all ships of value.

Not without reason did Lord Reay declare at the conference at The Hague: "that Article 5 constitutes for Great Britain an essential part of the program" (*que, pour la Grande-Bretagne, l'article 5 est une partie essentielle du projet*).² England had assigned in advance to Article 5 the task of an authorization to piracy.

Even for those merchant ships that had been caught on the high sea at the outbreak of hostilities, the (Hague) convention had made, in Article 3, the following protecting provision:

Restoration after the war without compensation, or, especially, destruction, on payment of compensation.

Concerning the obligation to indemnity in case of destruction,³ Germany did, indeed, make a reservation to Article 3, which had now the effect of making perfectly good prizes of the German merchant ships that had been caught on the high sea by the declaration of war.

It may be a debatable question whether the German proviso was a wise thing to do. But it is a fact that those States which, like Germany, are wanting in naval bases of support and, for that reason, can salvage prizes only under great difficulties, have a keen interest in a destruction without indemnification. But, on the other hand,

¹ Compare my article, "Die völkerrechtliche Stellung des Suez-kanals" in *Leipziger Zeitschrift*, 1915, p. 21, and my discussion in *Archiv für öffentliches Recht*, 1915, p. 538 ff.

² Protoc. III. 1037.

³ Compare the expositions of the German Plenipotentiary, Dr. Kriege, in Protoc. III, 954.

the ships of these States are lacking on the high sea in places of retreat at the outbreak of war and are easily brought up by a powerful navy.

Still, a critical reconsideration is advisable because of the certainty that England would not have acted otherwise even without the German reservation. Article 5 would have become in this case, too, a springboard for English piracy.

2. The (X) convention for the adaptation of the principles of the Geneva convention to maritime warfare¹ guarantees immunity from attack and confiscation not only to neutral but also to enemy, and even to government, hospital ships (Articles 1-3).

The Entente Powers have violated this agreement in a twofold manner. In one instance they have actually confiscated German hospital ships. The grossest violation occurred in the case of the steamer *Ophelia*. Then again they have systematically disguised their transports as hospital ships in order to obtain immunity in this sneaking fashion and, also, in order to be able to complain of brutal treatment in case they were shelled by German cruisers which were enlightened in regard to the whole situation.

3. According to the (XI) convention imposing certain restrictions upon the right of capture in maritime war (Article 1),² mail parcels of the belligerents, even when sent on enemy vessels, are inviolable, regardless of whether these packages are of an official or private character. But England not only disregarded this protecting regulation, she also meted out unscrupulously the same treatment to the mail parcels belonging to the neutral nations and transmitted on neutral vessels. This mail robbery was perpetrated mainly in the interests of the commercial system of spying.

The question now arises: Shall we be satisfied with the reestablishment of the present and, also, with the introduction of additional legal restrictions of the right of capture at sea or shall we take into consideration its complete abolition?

II. Even prior to the world war the abolition of the right of capture at sea constituted one of the main problems of the policy of laws and customs in maritime war.³ Abolition was demanded on many occasions, especially by peace societies and also by the Inter-parliamentary Union. Furthermore, this problem was repeatedly

¹ Compare, Wenglein, "Das Haager Abkommen betreffend die Anwendung der Grundsätze des Genfer Abkommens auf dem Seekrieg" (Dissertation of the University of Würzburg), 1911; Peters, "Der Seekrieg und das Rote Kreuz" (Dissertation of the University of Würzburg), 1911.

² Koelsch, "Die Völkerrechtlichen Beschränkungen in Ausübung des Beuterechts im Seekrieg" (Dissertation of the University of Würzburg), 1913.

³ See, F. Perels, "Das internationale öffentliche Seerecht," 1882, p. 204 ff., and the literature quoted by Stier-Somlo, p. 162,^{ss} and by v. Liszt VR.¹⁰, p. 345. Concerning the fight for and against the right of capture at sea, compare particularly, Schramm, "Das Prisenrecht," 1913, p. 100 ff.; Hüttenhelm, "Die Handelsschiffe der Kriegführenden" (Dissertation of the University of Würzburg, 1912), p. 3 ff.; Hirschmann, "Das internationale Prisenrecht" (Dissertation of the University of Würzburg, 1912), p. 3 ff.

the subject of discussion in the Institute of International Law (Institut de droit international);¹ and the Institute remained true to its decision to recommend the abolition of the right of capture at sea.

The reintroduction of this resolution for the last time took place during the meeting at Christiania, in 1912, with 31 votes against 9, and one member refraining from voting.² I recollect with what unfailing certainty the English members voted "no" at each roll call. The opposition consisted of 6 Englishmen,³ 1 Frenchman,⁴ 1 American,⁵ and 1 Swede.⁶ The Frenchman, Clunet, refrained from voting.

It was resolved by the Institute to work out two regulations upon the justification that:

since the acceptance of this principle has not yet been secured, which will not be done for a long time to come, and since the regulation of the right of capture is a matter that can not be dispensed with, the Institute calls upon the commission to work out careful provisions for all contingencies (comme l'acceptation de ce principe n'est pas encore acquise et, comme aussi longtemps qu'elle ne le sera pas, la réglementation du droit de capture est indispensable, l'Institut prie la commission d'élaborer des dispositions prévoyant l'une et l'autre éventualité).⁷

The "Manual of laws and customs in maritime war based upon the principle of capture of the enemy's private property" (Manuel des lois et coutumes de la guerre maritime ayant pour base le principe de la capture de la propriété privée ennemie) was first taken up and adopted⁸ unanimously by 54 members⁹ (8 sessions), with one member not voting,¹⁰ at the meeting in Oxford in 1913 after a session lasting five days.

In Germany, too, it was for a long time the consensus of opinion that the freedom of the sea in times of war must be preserved above all, regardless of the restrictions imposed by the rights of contraband and blockade, through the *abolition of the right of capture at sea*. Protection of the enemy's private property even in maritime war was an old Prussian postulate, and in this matter for a whole century since 1785 the Government of Frederick the Great stood side by side with the young American Republic. Ever since, in 1868, the North

¹ Established in 1873, this institute took up the question of the right of capture at sea in the following year, at the Geneva meeting. It was made afterwards the subject of discussion at The Hague conference in 1875, which passed a resolution against the protestations of the English members (Montague-Bernard, Lorimer, Travers Twiss, and Westlake), recommending the abolition of the right of capture at sea, except in cases where contraband is being transmitted or the laws of blockade violated.

² Annuaire, vol. 25, p. 600.

³ Barclay, Goudy, Holland, Kennedy, Leech, Oppenheim.

⁴ Jordan (Chief of a division in the French Ministry of Foreign Affairs).

⁵ George Grafton Wilson.

⁶ Reuterskjöld.

⁷ Loc. cit., p. 602.

⁸ Loc. cit., p. 607 ff. A copy of the Manual will be found on p. 610 ff.

⁹ Annuaire, vol. 26, p. 504 ff.

¹⁰ Anzilotti.

German Reichstag, in a resolution, declared itself in favor of an interstate settlement of these principles and, with the tremendous growth of the newly created empire, even attempted to force upon the German Chancellor the initiation of such a settlement, this international problem repeatedly came up for discussion in the Imperial Parliament.¹

But in the course of time a constantly increasing sober attitude was taken towards this problem, on account of the sad experiences. Thus, for example, immediately upon the outbreak of the Franco-German war, on July 18, 1870, the Federal Government of northern Germany declared its adherence to the principle of the freedom of the sea, but was forced to change its attitude because of the fact that the expected reciprocity failed to materialize. The Imperial Chancellor Caprivi, in particular, declared himself twice later on against a renewal of the proposal of 1868,² because he could not see any success resulting from it. Moreover, Caprivi had no faith whatsoever that any Government would discharge a duty imposed upon it, but was rather convinced:

that whosoever can derive benefit from the violation of enemy property rights during war will not hesitate for a moment to resort to it, provided he is powerful enough.

Next came the conferences at The Hague. The First Peace Conference at The Hague held in 1899³ confined itself mainly to receiving an American memorial and to listening to a beautiful speech delivered by the chief American delegate, White, which centered in a wish for the abolition of the right of capture at sea with the exception of the principle of war contraband. But in view of the letter of convocation, scruples of propriety arose which prevented a discussion of this problem and, accordingly, the conference confined itself to the expressing of the hope that the question of the inviolability of private property in maritime war may be made the subject of discussion at a later conference. But even in the expression of this innocent desire the English and French delegates pointedly refrained from voting, and both justified this carefully with lack of instructions.

In accordance with the above-mentioned wish, the "Elaboration of a convention regarding the laws and customs of maritime warfare in the matter of private property of the belligerents on the sea" (Elaboration d'une convention relative aux lois et usages de la guerre maritime, concernant la propriété privée de belligérents sur mer) became now part of the program⁴ of the Second Peace Conference at The Hague in 1907.⁵ Once more the head of the Ameri-

¹ Compare the summary in van Calker, p. 31 ff.

² Van Calker, p. 20 f. 32.

³ Compare my work "Haager Friedenskonferenz," II 262 ff.

⁴ Line 3 (third paragraph): Protoc. I. p. 17.

⁵ Concerning the discussions, see Schramm, "Das Prisenrecht," 1913, p. 105 ff.

can delegation, Choate, delivered a beautiful address¹ in favor of the abolition of the right of capture at sea, and this time America presented a prepared proposal,² which found an eloquent sponsor particularly in the Brazilian delegate Barbosa,³ but again without success, unless we are willing to regard as a success Agreement XI, imposing certain restrictions upon the right of capture in maritime war, and Convention VI, regarding the treatment of the enemy's merchant ships at the outbreak of hostilities.

On a ballot taken in the Commission on July 17, 1907,⁴ 21 States, among them Austria-Hungary, Italy, and likewise Germany—the last mentioned with an important proviso—voted for the American proposal, whereas among the 11 negative votes the following 5 leading powers were represented: England, France, Spain, Russia, and Japan. For that reason Schramm,⁵ in contradistinction to Nippold, concludes from the Hague Conferences that for a long time to come the right of capture at sea will not disappear from the laws of the individual States. The German proviso demanded that, prior to the abolition of the right of capture (*droit de capture*), the rights of contraband and blockade that were retained in the American proposal be subjected to a thorough regulation.

The German delegate, Baron v. Marshall, justified the approval as well as the proviso in the following manner:⁶

Since times immemorial Germany was in favor of the abolition of the right of capture in maritime war and has given ample proof of it. For that reason the eloquent exposition of the American delegate will find a lively echo throughout Germany. But the question of the abolition of the right of capture can not be treated separately; it merely constitutes a part of the greater problem of guaranteeing protection to private property in maritime war. Blockade and contraband are provided as exceptions. But these lead us into one of the most contested fields. It is only necessary to think of the controversy concerning the problems in conditional contraband and in continuous voyage. Only after a solution of these and other disputed points will we have the certainty of realizing the abolition of the right of capture, whereas through the granting of exceptions whose effect is left to remain indefinite we incur the danger of achieving a highly undesirable result. While we proclaim the abolition of the right of capture, the old system may, perhaps, continue to exist in practice without any visible changes.

¹ Protoc. III, 750 ff., 766 ff. Compare also the speech of the second American delegate Rose, III, 795 ff.

² Reprinted in Protoc. III, 1141.

³ Protoc. III, 780 ff.

⁴ III, 834. The abolition of the right of capture at sea was also indicated later on, and in another connection by the Belgian delegate, van den Heuvel, as constituting a reform question of the future.

⁵ "Das Prisenrecht," p. 118 f.

⁶ III, 788 f.

He concluded with the words:

If it is desired to grant through the abolition of the right of capture a more extensive protection to private property on the sea, then an agreement upon certain questions ought to take place first, so that this abolition may be effective and serve in an equal degree the interests of all nations. (Si l' on veut accorder à la propriété privée sur mer une protection plus étendue en abolissant le droit de capture, il faudra s' entendre préalablement sur certaines questions afin que l' abolition soit efficace et serve d' une manière équitable les intérêts de tous les pays.)

For that reason Baron v. Marshall refused to vote the "simple aye" on that proposal. With a commendable frankness he had stated the very essence of the problem.¹ The intimate connection that exists between the rights of capture at sea, of blockade, and of contraband and which had been pointed out later on in the Reichstag,² particularly by deputy Dr. Spahn, makes it possible to secure upon the abolition of the right of capture complete indemnification through the rights of contraband and blockade. Triepel, too, took a hand recently in discussing this sore point with a delightful disregard. He argued as follows: The right of capture at sea, the right of contraband, and the right of blockade are three chains of sea commerce, so artfully linked that upon the loosening or destruction of one the other takes a so much firmer grip.

Capture at sea, contraband, and blockade are like three clavi-chords of an instrument, one or the other of which may be played according to choice, in order to always produce the identical sound. In case of necessity contraband may be given up, as long as blockade is retained. And it is possible to abandon blockade as well as capture at sea, as long as contraband remains.³

But when Triepel declares further on that the regulation of the right of contraband is an undertaking that is "like the squaring of the circle," then attention may be called to the fact that, according to Triepel's own admission, the right of contraband as well as the right of blockade have in the meanwhile been regulated by the London Declaration of 1909 concerning usages on the sea, "in accordance with a sensible regard for the interests of belligerents and neutrals."⁴ Of course, England saw to it subsequently that the London Declaration received no binding force, or, rather, that it lost it again.

¹ This was admitted and also commented upon by Loreburn, pp. 72, 66 ff. Furthermore, Renault, too, was of the opinion that the solution of the problem of the right of capture at sea depends upon a previous solution of the questions of blockade and contraband. See Schramm, p. 110 f.

² On May 14, 1914.

³ p. 35.

⁴ p. 13. Triepel is of the opinion that "had the London Declaration been binding in the present war and had it been handled loyally, it would have saved us, at any rate, a great deal of evil."

However, the mere fact of an agreement shows that in this respect an understanding or an adjustment of interests is by no means impossible. It would have even been possible to extort the latter in the world war, if the neutrals had only stood together.¹

§ 4. THE PROBLEM OF THE FUTURE.

I revert now to the question raised on p. 31: Shall we go back to the legal status quo ante or shall we go beyond it by keeping in view the abolition of the whole right of capture at sea?

President Wilson's message to the Senate delivered on January 22, 1917, demanded—

that freedom of the seas which in international conference after conference representatives of the United States have urged with the eloquence of those who are the convinced disciples of liberty.

The President apparently had in mind the abolition of the right of capture at sea proposed by the American delegation during both Peace Conferences at The Hague. Only in this manner can we explain the reference on the part of the Union Government to a former cooperation between Germany and America, which consisted in the joint recognition of the inviolability of private property in maritime war.

I do not know whether the German Government intends to include in its latest demand for the freedom of the sea also the abolition of the right of capture at sea. At any rate, the task falls upon science of international law to contribute her share to the solution of this problem and to work out some authoritative points of view in preparation for a final solution by the interested Governments.

I. From what motives has the *American Union* up to the present time demanded the abolition of the right of capture at sea while *England* insisted upon its retention?

1. *America* declared it to be a matter of right, justice, progress, and humanity that the private property of the population should be respected not only in warfare on land but also guaranteed in maritime war.²

It would therefore justly seem surprising that the first move against Article 23h of the Hague Convention, concerning the laws and customs of war on land, should have been made by an American, General Davis, and that America has aided the English with such an alacrity in changing the present war into a real international conflict and even in chastising the neutral nations with the whip of

¹ Similarly, Liepmann, "Die Freiheit der Meere," in *Deutsche Juristenzeitung*, 1917. Nos. 21-22, p. 924.

² Compare my essay "Haager Friedenskonferenz," II, 267 ff., and Schramm, "Prisenrecht," p. 106 ff.

starvation. Now, if the Anglo-American interpretation of the war becomes a menace to section 23h, and through it to the protection of private property in warfare on land, then the Americans have lost their most effective weapon in the fight against the right of capture at sea.

At the Peace Conference in 1899 the American plenipotentiary, White, stated that the Americans were not only a practical people but also idealists. Wilson particularly has flooded the world with speeches which are brimful of phrases about justice and love of mankind. Every German to-day values these outpourings for what they are—phrases. Furthermore, after the war we are not going to fall any longer for American rhetorics. We know that America makes her decisions simply after a consideration of her own interests, using afterwards idealism as an advance agent in announcing her interests. Thus, it may be taken for granted that the Union favored up to the present time the abolition of the right of capture chiefly because, in view of the peculiar conditions of her Navy, she recognized such an abolition as being advantageous to America. But a different situation arose with a change in these conditions. For that reason Mahan, a leading authority in American marine circles and who represented the Union at the first Hague Peace Conference as a (naval) delegate, argued a long time ago that the abolition of the right of capture at sea is no longer suitable to America, since the Union possesses now a large battle fleet but still a small merchant marine and is, for that reason, in a position to gain rather than lose by piracy. Niemeyer is, therefore, of the opinion: "If appearances do not deceive, the United States is on the point now of changing its former attitude."¹ He adds that American imperialism and the naval policy necessitated by it apparently open up new pathways also to the international policy of the United States. It now remains to be seen whether this policy will not be changed again because of the tremendous growth of the American merchant marine. Undoubtedly the Union makes her decisions in accordance with her own interests. We do not reproach America for it by any means, only we ask for frankness and hope to be spared all idealistic and flowery speeches.

Self-interest constitutes among the governments the fixed starting point for their policies of right and justice. No State will favor the abolition of the right of capture at sea, if this is contrary to its own interests. Reversely, a government will agree to such an abolition, if it is convinced that it can derive benefit from it. It is urgently necessary to state this once for all clearly and frankly.

For this reason, I stated as early as 1907:

It is to be hoped that England's own interests will swerve her yet from the policies followed by her thus far. The principles of

¹ "Prinzipien des Seekriegsrechts," p. 20.

right and justice may perhaps offer a much better protection to the English gigantic merchant marine with its enormous valuation in goods than could be given it by the strongest battle fleet. The English merchants have long ago become convinced of the truth of this fact; the English Government will follow suit in due time.¹

Thus Lord Salisbury, the former prime minister, too, has confessed himself, in contradistinction to Lord Avebury, to the principle of the inviolability of private property in maritime war. Likewise Cobden and the English merchants had declared themselves previously and certainly not from purely disinterested idealism in favor of the abolition of the right of capture at sea.²

Shortly before the outbreak of the world war there appeared in England a pamphlet of utmost importance which caused the greatest sensation on account of its contents as well as because of the identity of the writer. Its author was Earl Loreburn, the former lord chancellor who, already in 1905 and 1911, while a member of Campbell-Bannermann's Cabinet, advocated the abolition of the right of capture at sea.³ The pamphlet appeared in 1913, bore the title "Capture at sea," and was translated into German by Niemeyer.⁴ Of greatest interest is his programmatic point of view.

Loreburn does not justify his demand for the abolition of the right of capture at sea, as was hitherto customary, with references to humanity and laws of nature, but with the practical political reference to the well-understood and common interests of all States.⁵ On page 19 he states with a delightful frankness:

We desire to treat this matter purely from the standpoint of British interests and need not be afraid to state openly in how far these interests are served by the inviolability of commerce; for, undoubtedly, our needs, our weak points, and our strength are well known to the foreign governments.

Loreburn argues as follows:⁶ There exist dangers that are more menacing to England than an invasion. England is not only the

¹ "Haager Friedenskonferenz," II. 269.

² Loc. cit., p. 263.

³ Stier-Somlo, p. 100.

⁴ "Privateigentum im Seekrieg," 1914. In the introduction, on page V, Niemeyer observes: "Lord Loreburn's treatise is a political book in the best sense of the word. It is accepted as such throughout England. On the one hand, it is praised there most highly, while, on the other hand, it is condemned most severely. No doubts have been expressed whatsoever, that it is a pamphlet containing a political program of the first rank. The unprecedented fact, so contrary to traditions, that an English statesman, shortly after his relinquishment of a ministerial portfolio, should have advocated fearlessly and in unmistakable terms what is usually called a liberal policy of international law, has been received with mixed feelings in England. The clear, intelligible and impressive manner has been generally recognized with which this book treats a problem, whose slogans are familiar to every one and are on everybody's lips but whose nature is not as clear to every one, as it is surely to be to the careful reader after a perusal of Loreburn's essay."

⁵ Niemeyer, too, mentions this fact most prominently. Loc. cit., p. IX.

⁶ Loc. cit., p. 20 ff.

greatest military naval power but also the greatest State engaged in oversea commerce. If the English merchant ships become subject to capture, then this means irreparable injury to England; should the neutrals gain by a decrease in the English merchant marine, then England loses her trade. There are not enough merchant ships in the world to take over the transportation of the English oversea trade in addition to the own trade of any given nation. The earning power, nay, the very lives of the English depend upon import and export, and the import includes by far the greater portion of English foodstuffs and raw materials for her industries. This importation means life or death.

We can desire but not believe that the loss may prove entirely insignificant because our fleet is so superior that within a short time it could destroy the entire fleet of the enemy or blockade it in harbors. It is indeed a very comfortable and assuring view; but only those can hold it who do not know or else pay no attention to what both conferences of 1907 and 1908-1909 have revealed concerning the intentions and opinions of the foreign powers in the matter of transformation of merchant ships into vessels of war.

The English console themselves with the thought that, under the right of capture at sea, they would suffer less than the other powers, and are for that reason unwilling to renounce this weapon. Loreburn, too, examines this pretext by taking up (p. 41 ff.) successively cases of war with Germany, France, America, Japan, Austria, Russia, and Italy. We are particularly interested in the case of an Anglo-German war, and in this connection the author argues as follows: As long as no respite is given, the whole situation resolves itself into a "two-handed game." No one can foresee who will suffer more under these circumstances; but the number of British ships in German ports or waters might be the larger one. And in the course of the war the slogan would certainly be: Take what you can. We shan't probably get much booty. The Germans will undoubtedly stop their commercial navigation on the high seas by simply keeping all German ships in their home ports. But the English would be driven out of the Baltic Sea and, what is worse, they could not count upon normal conditions in the North Sea. Moreover, English oversea trade would have to suffer on account of cruiser warfare. For, thus he goes on to say: "Our trade reaches all corners of the world; we offer a greater target for an attack, because we have more ships." However, this could be still endured if the right of capture at sea were to shorten the war. The Germans might, perhaps, lose their income from the merchant marine; but they could, perhaps, satisfy the needs of their people even without their own commercial navigation. Because, in the opinion of the author, Germany would need only one-fourth the number of neutral

ships that would be required by England in case the entire English merchant marine were compelled to remain idle in the ports.

The following deductions of the former lord chancellor read like a death warrant of present English maritime warfare:

Germany would still have other means. Even if we were at war with the Germans, no one could prevent British merchant ships from transporting goods to and from neutral ports, such as Rotterdam and Antwerp. No matter how certain we might be that these goods will find their way into Germany, still no human being could prove it in the case of a given cargo, and even if this could be done, there exists no law prohibiting the shipment of goods to neutral ports, if and because the neutral merchant intends to use them as a medium for trading with the enemy (p. 47 f).

By all rights and laws—thus Loreburn argues further on—shipments may be made just through neutral vessels. German ports would remain open to neutral ships, and the latter would be hampered only in the shipment of contraband goods. Of course, the blockade could help some by closing all German seaports even to neutral merchant vessels. "But it would not close Rotterdam nor Antwerp, and in this way German exports and imports could depart as heretofore through these channels from German centers or reach German destinations" (p. 49). Loreburn closes this part of his expositions with the following words:

But if it is maintained that we could in this wise destroy or force into submission a great, rich, highly talented nation of 65,000,000 people, in spite of the fact that the boundaries of this country border upon those of seven other States, with whose aid it could import any desired article, then such an assertion, I confess frankly, seems to me totally absurd (p. 50).

Thus far Loreburn.

It has also been pointed out that the fleet, no longer required to chase after merchant ships, would become free for its purely military task, and could thereby render better services; but the reverse could, perhaps, be said with a greater deal of truth: If the right of capture at sea—and as a further consequence the rights of blockade and contraband—are done away with, then the sphere of activity of the battle fleet becomes too limited; it would then have to wage war only upon the fleet and coast defenses of the enemy. It is, therefore, only too natural that naval officers can not be easily enlisted for such reform plans. Indeed, it would be surprising were this otherwise.

For that reason Hirschmann regards the whole matter as a "question of military strategy,"¹ but without justification. In this connection Loreburn lays stress upon the fact that many improvements

¹ "Das internationale Prisenrecht," p. 13.

in the right of capture at sea could be wrested from the English naval experts in spite of violent opposition on their part,¹ and he rightly maintains that we have to distinguish here "between military questions concerning which naval officers can render an opinion with a decisive authority and between political questions concerning which they have no right to claim a competent judgment."² The abolition of the right of capture at sea is a political question, indeed, and will remain one even if, quite naturally, the expert knowledge of the naval officers is of utmost importance in certain respects and can not be dispensed with. The final decision, however, rests with the government which considers the whole matter from the point of view of political expediency.

Loreburn's prediction was correct: The right of capture at sea does not give England a decisive weapon against Germany. And because the English Government, too, became convinced of this truth, it saw itself compelled to stake its hopes on a different card, and thus originated the illegal policy of subduing Germany by means of starvation.

2. *England* has always endeavored to justify the retention of the right of capture at sea in the first place with an alleged contrast between warfare on land and warfare on the sea. She claimed that the abolition of the right of capture at sea neither takes into consideration the purpose of maritime warfare nor the stern necessity of war and is, for that reason, an utopy. The right of capture at sea constitutes an essential peculiarity of maritime warfare, for, while in warfare on land the will of the opponent is, indeed, broken by a victory of the army, in maritime warfare a victory on the part of the navy does not yet assume a decisive importance; on the contrary, the attacking power must first lay its hands on the roots of the enemy's national prosperity and shake his commerce to the very foundations.³

Sir Edward Grey, too, justified, on February 6, 1908, the adverse attitude of the English delegates to the Second Hague Peace Conference in the following words:

England's ability to bring a war to conclusion rests solely upon her naval power; and if private property were to become inviolable, then I do not see how a war could ever be brought to a conclusion. The result of such a declaration of inviolability would be that other powers might be misled to the supposition that Great Britain's fleet is only a defensive weapon. If Eng-

¹ p. 11.

² p. 151.

³ Compare Hirschmann, "Das internationale Prisenrecht," 1912, p. 9: "Since times immemorial and also at the Second Peace Conference at The Hague the defenders of the right of capture at sea have taken the position that the object of maritime war has been achieved only after either side succeeded in shaking the enemy's commerce, his entire commercial and political relations, and through it his colonial prosperity."

land deprives herself of the means of bringing pressure to bear upon the other nations through their own merchant marine, then some great powers could declare war against England with the least possible danger to themselves.

In Germany, too, this point of view has gained popularity from year to year, although the geographic position of Germany and the lack of bases of support are not quite favorable to it. It represents, perhaps, the prevailing German opinion to-day. However, considerations of a serious nature are against it.

The end of a war means the overwhelming of the enemy until he is destroyed completely, and we learn from Grotius that "in war everything is fair that serves to end the war" (*omnia licere in bello quae necessaria sunt ad finem belli*). But I can not admit that the retention and practice of the right of capture in maritime warfare are necessary in order to bring war to a conclusion.¹

More is expected of the right of capture at sea than can be accomplished by it. Maritime warfare has been wholly overestimated as to its ability for achieving military results. To Niemeyer belongs the distinction of having established this fact.² Neither maritime warfare in general nor the right of capture at sea in particular are able to break the will of the enemy. And just out of this impotence of warfare on the sea there grew up the impulse toward brutalization which has become once for all typical of maritime war.

He who has the feeling of being unable to overwhelm the enemy, begins to bite and scratch. In maritime warfare both sides are like combatants whose hands are tied and who, therefore, try to make up in every other possible way for the missing use of the hands.

The practice of capturing prizes on the sea is a war measure like any other measure. It is a device for injuring the enemy, it may be equally used by both warring factions and can easily become mutually harmful. Each side inflicts and receives punishment. Now, from the point of view of the public interest of a state the defenders of the right of capture at sea assume that their Government can only gain, while the opponents of the right of capture at sea maintain that their state will lose by it. Thus the whole question resolves itself into

¹A. M. Niemeyer, "Prinzipien des Seekriegsrechts," p. 22; Schramm, "Prisenrecht," p. 105, and others.

²p. 16: "The difference between maritime warfare and war on land may be summed up as follows: Maritime war is an insufficient form of warfare never achieving the final objects of war. This is caused by the fact that, in maritime war, it is impossible to press the knee against the enemy's breast, to place the knife against his throat. Even the complete destruction of the enemy's naval forces, the utter ruination of his commerce, and the strangling of his intercourse on the sea do not achieve the results that are obtained in warfare on land through the occupation of the enemy's territory, through the military exercise of a territorial authority in a foreign country, and through the mere gagging of his own Government." See also p. 21.

³Niemeyer, loc. cit., p. 17.

an equation or a problem in arithmetic. But how many unknown quantities must be assumed in such an equation?¹ It is self-evident that a state with a large battle fleet but with a small merchant marine will find a greater field for attack during a combat against a nation where the conditions are reversed; and such a state will have as keen an interest in the retention of the right of capture at sea as will be displayed in its abolition by the enemy. But where are such conditions in advance certain and guaranteed to last?

Furthermore, when two nations apparently having a battle fleet as well as a merchant marine of equal size, are opposed to each other, then the value of the right of capture at sea to one or to the other war faction will depend upon the geographic position, upon the composition and armaments of its battle fleet as well as of its merchant marine, upon the degree of skilfulness and willingness of the ship crews, and also upon other circumstances whose effect can not be foretold in advance but can always be seen from the results that have been achieved.²

All these circumstances which may become later on decisive are for the time being shrouded in mystery. And what is the conclusion of all this?

Niemeyer states:

accordingly, no great power can agree to-day, reasonably and honestly, to the enactment of an international law against the right of capture at sea.³

I maintain, however, that in view of this uncertainty, a strong need for the retention of the right of capture at sea exists no longer.

We will have to agree with Barbosa * that each nation will be compelled eventually to build up its battle fleet in proportion to the size of its merchant marine. For, "the battle fleet is the shield, the necessary protection of the merchant marine" (*la marine de guerre est l'égide, la protection nécessaire de la marine marchande*). And thus even Barbosa holds the right of capture at sea eventually responsible for the gradual growth of the navies and sees in it with good reasons an essential obstacle to disarmament.

We may count upon it that among the great powers of the future the war and merchant navies will be in a nearly equal proportion, and that, for that reason, none will offer a special target for an attack through the right of capture at sea. But under such conditions the capture of prizes becomes an ordinary war weapon that may prove just as easily advantageous as injurious to each power, and which, even under most favorable circumstances, will not yet gain for it the final decision.

¹ One has only to compare the arguments of Niemeyer, p. 20 ff. and Hirschmann, pp. 3-16.

² Niemeyer, p. 21.

³ "Prinzipien," p. 22.

⁴ Protoc., III. 786.

To be sure, one may point to the world war; but what lesson does it teach us?

England by no means made her plans for maritime warfare in accordance with the right of capture, but according to the policy of starvation, so contrary to international law. The right of capture under the most favorable circumstances would have led to the result that those German merchant ships which at the outbreak of the war were lying in enemy ports or navigating on the high sea would have met the fate prescribed for them by Articles 1 and 3 of the (VI) Hague Convention. The other German merchant ships would have remained at home.

Reversely, many Germans now hold on with doubled energy to the right of capture at sea by pointing to the success achieved by our submarine warfare and by being also unwilling to give up such a weapon in the future.

However, the characteristic trait of the present submarine warfare is not the destruction accomplished by it, but the destruction without warning. And in this respect the fact is being constantly overlooked that the unrestricted or intensified submarine warfare has its justification only in the English violations of law, and is, therefore, permissible merely as a weapon of defense or retaliation. This I pointed out in another place;¹ it also constitutes the basis for the notes of the German Government, addressed to the Union, that are discussed there, and it represents the prevailing opinion in Germany.² Moreover, it is a mere supposition that the superiority of the German submarines is assured forever; it is a mistake to suppose that the sinking without warning is justified even in cases where the enemy displays a correct attitude and that it must be accepted by the neutral powers. Although our present position is one of defense and retaliation, nevertheless the entire world has arisen against us as if in a storm of resentment. And yet some people believe that even in cases where the enemy acts correctly, unrestricted submarine warfare is, or at least may, become legal according to international law? *Je m'en fiche*-politics is being played, and one meets with a constant refusal to exchange tested measures of force for uncertain mutual concessions between states.³ However, this is not the true state of affairs.

¹ "Der Lusitania-Fall," 1915, p. 37 ff.

² See also the speech delivered on October 10, 1917, by Deputy Haussmann in the Imperial Parliament. This excellent speech is reprinted in full in the weekly "Deutsche Politik," No. 42, pp. 1342-1356: "It is a fact which I do not attempt to deny, that there existed in Germany a group of people who saw in the English blockade a welcome opportunity for extending the rights of belligerents; but neither the people nor the Government were on their side. It must be made clear once for all: an overwhelming majority of the German people see in the unrestricted submarine warfare nothing but a fearful defensive weapon against a fearful violation on the part of the enemy, which will lose its moral and legal justification at the very moment when the enemy has once more recourse to right and justice." (Op. cit., p. 1351.)

³ See Triepel, p. 37: "The last few months have revealed the most vulnerable parts in the English armor. All of this ought to warn us to be doubly prudent and doubly obstinate. Privileges are easily given up; but it is impossible to win them back, after repentance has set in."

It shall not be denied that the right of capture at sea has given us a welcome pretext for our present measures of retaliation. But it is equally true that, should in the future retaliatory measures become again necessary as they are to-day and for similar reasons, the previous abolition of the right of capture at sea would not constitute an obstacle to the shaping of retribution in exactly the same manner as now. It is impossible to prepare in advance a justification for defense and it goes beyond even permissible precaution.

Just the same it can not be denied that the point of view to which exception has been taken here is not without a justifiable basis. The manner in which the war is being waged by the Entente Powers has violated the old laws and customs of maritime warfare, and in the formulation of new laws Germany will impose its conditions. If, owing to opposition on the part of England, Germany does not achieve freedom of the seas in a rational sense of the word, then she will better give up the idea of an agreement and will leave everything to the usage of nations. Germany will then, in a given case, simply wage war on the sea in such a way as will best suit her purposes. Perhaps, if England is confronted with a reappearance of the terrifying ghost of submarine warfare, she will be ready for just agreements concerning the freedom of the seas. Thus the submarine weapon can prove itself also here a useful weapon for bringing the English to their senses.

I now revert to the question of the abolition of the right of capture at sea.

A thoroughgoing estimate of the value of capture at sea shows it to assume increasingly modest proportions. It is simply not true that the right of capture hits the prosperity of a given nation at the very roots, that it has a decisive influence upon the war, and that it hastens the end of the combat.¹ The right of capture reveals itself as an entirely ordinary war measure of a doubtful value. *Under these circumstances the final decision must be looked for in different quarters.*

If we desire to win over the world to the abolition of the right of capture at sea, then we must convince her that such an *abolition is a matter of universal interest.*

The practice of capture is a deviation from the principle that war is a combat against the military forces and not against individuals. It may be that, under modern conditions, the subjugation of the enemy can no longer be achieved without encroachments upon the destinies of the civilian population. But a restriction of some sort must be found eventually.² Is it wise, then, to turn loose the hor-

¹ Similarly Liepmann, *Deutsche Juristenzeitung*, 1917, Nos. 21, 22, Sp. 926.

² On a previous occasion already, while reviewing Eltzbacher's book, I have stated: "The finding of such an adjustment between objects of war and national interests or its clearer elaboration is a task for the future." ("Weltwirtschaftliches Archiv," IX, No. 3, p. 411.)

rors of an international war, as long as the warlike balance depends upon so many "ifs" and "buts"? The objection that the right of capture in maritime war merely constitutes an indemnification for the right of requisitions or levying contributions in war on land¹ is void. The laws of maritime warfare, too, recognize requisitions and contributions;² but the right of capture at sea does not serve the same purpose as does occupation in warfare on land; it knows nothing of an indemnification, although it spells destruction, too.³ The right of destruction is the twin brother of the right of capture, and international law is so little interested in the subsequent fate of a war prize that it provided⁴ no restrictive measures whatsoever concerning the destruction of enemy prizes, but rather maintained an absolute silence in the entire matter.

And it is just this senseless mania for destruction, inherent in the right of capture at sea, which forces upon our lips the question as to its internal justification, and thereby we rise at last to the heights from which the whole controversy ought to be viewed.

The right of capture at sea is a war measure of a doubtful value to the belligerents whose effectiveness depends, at any rate, upon many special suppositions that can not be foreseen in advance at all but which, on the other hand, means under all circumstances a coarse and mad destruction of the national prosperity, from which the neutrals, too, may suffer and whose wedge may even be turned against the captor and destroyer, respectively. The full international effect of the right of capture can be seen in the matter of marine insurance.⁵ For that reason the right of capture at sea not only carries the attack beyond the military opponent, but it also breaks up the community of interests which, in the matter of oversea trade, exists throughout the world. For the practice of capture at sea not only hits the enemy shipper, but above all also the neutral consignor, who awaits in vain the arrival of the cargo. The world can not permit of the repetition of such conditions as have come to pass during the present war.

Public opinion in all countries will not cease to find ways and means by which to prevent the recurrence of such boundless and senseless destruction among civilized nations. * * *⁶ Just as international law is altogether possible only among nations that have a community of interests, so is it likewise possible

¹ This was particularly asserted by Renault at the Second Hague Conference, III, 793.

² Compare the (IX) convention concerning the bombardment by naval forces in times of war, Articles 3 and 4.

³ See also Loreburn-Niemeyer, p. 161 ff.

⁴ The London Declaration of the laws and customs of maritime war contains in Article 48 ff. protective measures only concerning the destruction of neutral prizes.

⁵ Concerning the attempts to introduce government insurance, see Wehberg, "Seekriegsrecht," pp. 244-254.

⁶ Liepmann, "Die Freiheit der Meere" in Deutsche Juristenzeitung, 1917, Nos. 21-22, Sp. 924.

to carry into effect a particular war rule, like the freedom of the sea in war, in so far only as, in spite of the war, a community of interests is maintained between the belligerents and neutrals.¹

The problem of the right of capture at sea must be raised to the heights of a community of interests. And this is by no means difficult. The community of international law is often confronted with conflicting interests and must in such cases follow a diagonal line. However, in view of the indecisive character of the right of capture at sea and in view of its uncertain, questionable value to the prosecution of war, the thought of a fixed and deeply rooted conflict of interests between nations can not be very well entertained, and the common interests of all parties concerned will find the more eloquent defenders, since the belligerents of to-day may become the neutrals of to-morrow. As was pointed out by Choate at the Second Hague Peace Conference, the right of capture at sea means the destruction of the great community of interests among the nations; and the miserable advantage offered by the right of capture, even under the most favorable circumstances, stands in a striking disproportion to the enormous damage inflicted upon the commerce of the world. The present world war, in the course of which more than the right of capture at sea has been thrown into the scales, made it perfectly clear to the entire world that, in the last analysis, the right of capture neither avoids war nor shortens its duration. Choate was right in maintaining that war, in accordance with its nature, has to be, and remains only "a test of strength on land and on sea between the military forces and financial resources of the combatants" (*une épreuve de puissance, sur terre et sur mer, entre les forces militaires et les ressources financières des combattants*).² In other words, we have gone back to the principles enunciated by Rousseau!

Whoever is opposed to the right of capture at sea will also reject as inconsequential such reforms³ which assume that with the capture of the sea prize the object of the right of capture at sea has been achieved, and that, for that reason, the ship and cargo should be returned later on.⁴ A right of capture at sea which becomes a legal obligation to indemnification is anyhow fully ripe for the discard, since it is unlikely to satisfy either the captor or the enemy.

II. *Shall Germany contend for the abolition of the right of capture at sea or consent to it?*—One will have to answer, yes; provided a satisfactory and simultaneous regulation of the rights of blockade and contraband will take place excluding a reappearance of the right of capture at sea in a different form. For the whole

¹ Loc. cit., Sp. 923.

² Protoc. III, 762.

³ Wehberg, "Seekriegsrecht," p. 255.

⁴ Concerning the competent attempts at reform, see op. cit., pp. 254–256.

world is agreed that there exists a connection between these three rights and knows well that these questions ought not to be segregated by means of waterproof bulkheads.

This would then be a direct continuation of the German policy advocated by Baron v. Marschall at the Second Hague Peace Conference.¹ Let us, therefore, come first to an understanding concerning the rights of blockade and contraband!

The abolition of the right of capture at sea, without a simultaneous legislative regulation of the rights of blockade and contraband, would constitute a daring jump in the dark. One only has to think of Triepel's "three keys!"

For that reason, the arguments concerning the rights of blockade and contraband that are put forth in the succeeding pages assume an additional importance. But one right of blockade and contraband can be suffered to exist, and this must be of such a character as to be entirely unsuitable to serve as a sort of relay to the right of capture at sea or to the reintroduction of the abandoned privileges in a roundabout way.

Many are at hand with the prophecy that the nations—and particularly England—can never be induced to agree to the abolition of the rights of capture at sea and blockade and, as a further consequence, to the abolition or thorough revision of the right of contraband. But this remains to be seen; for, it is reasonable to assume that even the governments have learned a lesson from the world war. On the other hand, there are others who mistrust England's pledges and who believe at the most in a change on paper only. All of these questions will be taken up once more, though briefly, in the conclusion to the present pamphlet. I only wish to state here most emphatically that as between the abolition of the right of capture at sea and the repeal of the two other sea laws, I certainly value less highly the abolition of the right of capture at sea.

In the exercise of the rights of blockade and contraband certain demands are made upon and from neutrals; whereas in the exercise of the right of capture at sea the belligerents have the whole field to themselves.

As a whole I have little faith in a regulation of war measures and of the mutual relations between the belligerent parties.² England's case has shown conclusively that such agreements hardly stand the test when it comes to actual applications.

When we demand to-day freedom of the sea in time of war, we do not think—from the standpoint of the present war—so much of ourselves as of *the neutral nations*. Freedom of the seas in the first place means the right of those nations who have remained neutral

¹ See above, p. 34 f.

² See also Niemeyer, "Prinzipien des Seekriegsrechts," pp. 18–19.

to carry on trade, even during the war, with the other neutral States as well as with the belligerents.¹

The continued violations of the laws of neutrality with which our opponents have burdened their debit in the present war will result in a powerful countermovement after the war, which will end in a strengthening of the position of the neutral nations, who will certainly oppose jointly all future encroachments upon their rights and who will prove strong through such a coalition. In a future war of English make the American Government, which has totally discredited itself on account of its phrases, will not be offered the direction again, nor will the defense be run into a dead track.

Freedom of the sea in time of war, even in the sense of the German conception, can and will have to be realized mainly within the letter of a *liberal law of neutrality*.

For that reason the statement of the Imperial Chancellor von Bethmann Hollweg, made on August 19, 1915, declares that we desire to obtain the freedom of the seas of the world "for our own protection as well as for the protection and welfare of all nations."

The recruiting power of the German program lies in the fact that we wish to remove a tyranny on the sea under which the entire world is groaning. Evidently President Wilson seemed to have had some similar thought in mind when in his message to the Senate, cited above on p. 36, he demanded for the restoration of the freedom of the sea such rules as would "make the seas indeed free and common in practically all circumstances for the use of *mankind*." Only he confined himself to high-sounding phrases.

¹ Similarly v. Liszt, *Deutsche Juristenzeitung*, 1916, Sp. 18-24; Kohler, op. cit., Sp. 153 f; Müller-Meiningen, loc. cit., p. 383.

CHAPTER II.

THE RIGHTS OF BLOCKADE AND MINE-LAYING.

§ 5. THE RIGHT OF BLOCKADE AND THE ENGLISH BLOCKADE.

I. A *blockade*, as will be seen later on, may be either military or commercial in character, and denotes in either case the closing by means of warships, of ports and coasts, and through it an incisive restriction of the freedom of the sea. For the freedom of the sea does not mean that it is possible to navigate on the high seas, but that through the use of the highways of commerce it is possible to make ports to carry on trade and commerce with over-sea countries.

As a military operation the blockade is directed only against the enemy. Access to neutral ports and coasts must never be closed. But, nevertheless, the blockade directs her real wedge against neutral navigation. For thus far enemy merchant vessels are anyhow subject to the right of capture whenever and wherever they are met by an enemy warship; no blockade is necessary for that. It is true that neutral vessels can carry on commerce even in times of war, but blockaded ports remain closed to them. A neutral vessel caught in the act of running the blockade must pay for its disobedience with the loss of the ship and, in case the vessel is unable to prove its good faith, with the additional confiscation of the cargo.

Owing to this acute danger to neutral navigation the legal assumptions of blockade become of vital importance. Only such a blockade which fulfills all legal definitions can achieve, according to binding laws, its designated effectiveness and inflict mortal injury upon neutral trade and, respectively, upon communication with the blockaded territory. The assumptions of blockade are in this case the "component elements" of the freedom of the sea.

The right of blockade was regulated and developed more fully for the first time in 1909 by the London Declaration of the laws and customs of maritime war. It matters little in our discussion that this declaration was not ratified, because, as is explicitly emphasized in Article 2, the basic regulation of the right of blockade took place already through the Paris Declaration of maritime laws of 1856, which was ratified by the signatory powers and, as is brought out by

the official interpretations to Article 2, "actually" accepted by the other nations, as far as the portions pertaining to legal blockade were concerned. Accordingly, the blockade, in order to be legally binding, must be effective in fact, that is to say, it must be maintained by a real fighting force sufficiently large to actually prevent access to the enemy coast. This legal restriction means a far-reaching protection for neutral navigation. Without an effective blockade by means of a naval squadron which, from a corresponding distance, actually closes the enemy coast from the seaside, communication is legally free; without these legal assumptions of blockade the neutral nations have freedom of the seas.

II. *But what is the nature of the so-called "blockading" of Germany by England in the present world war?*—No English squadron is actually blockading the German coast. No English ship is at anchor in front of a German port. And England knows the reason why. The English battle fleet, which, according to Churchill's boastful declaration, was to drag forth the German Navy from her mouse hole, is weighing her anchors safely in English ports and does not dare to send out a blockading squadron. This so-called blockading of Germany is the long-condemned "*blocus anglais*," a blockade from a distance and a paper blockade, which affects Germany indirectly and in so far only as the neutral nations to the north were cut off by a belt of mines.

The closing of the North Sea, with which England surprised the world on November 3, 1914,¹ which the guilty English conscience tried to justify by bringing into play purely invented reasons of retaliation,² and by means of which Germany was to be starved out, is not a blockade in the legal sense of the word, but an atrocious violation of international law. For, starvation is permitted only as a phase accompanying a siege and actual blockade in a legal sense, but never constitutes a war weapon in itself. Van Calker, too, emphasizes:

The English declaration of a barred zone, in view of its nature and its results, constituted thus far unquestionably the most serious violation of international law that was committed in the entire course of the world war and imposed uncommonly harsh hardships upon the entire German nation.³

But this so-called blockade is also a crime against the laws of neutrality. For neutral States must never be included in the barred belt.

¹ See the communication of the British Ambassador at The Hague transmitted to the Dutch Minister for Foreign Affairs on November 3, 1914.

² See Pohl, "England and the London Declaration," 1915, p. 16.

³ "Das Problem der Meeresfreiheit," 1917, p. 25; Stier-Somlo, p. 116.

The English closure by means of mines violates the right of blockade as well as the right of placing mines. The right of blockade rejects a blockade from a distance, restricts its operation to the territory occupied by the enemy, and insists upon a closure effected through the medium of the naval fighting forces. On the other hand, the following has been established concerning the right of placing mines: It is true that a law against the strewing of mines on the high sea, which England herself advocated at the second Hague Peace Conference, was not enacted at that time, because the mines were regarded as offering a protection to the weak nations who, in view of existing conditions, could gain security for themselves against pursuing warships only by leaving behind them a field strewn with mines. However, this involved a war measure directed purely against the enemy, and England was not successful in her attempts to have this declared an illegal practice. But England's present attempts to establish a blockade by means of mines is nothing else but a direct challenge against the neutral nations. The Hague convention in regard to the placing of mines, after some introductory phrases, has for its main object "to guarantee to peaceful navigation, as far as possible, that security to which it is also entitled in time of war." Instead, England simply closes now an entire sea, and announces to neutral ships that they will have to fly henceforth through the air in their journey to a neutral port. The whole English declaration of a war zone is solely directed against neutral navigation in order that, with the barring to neutral ships of the road to Germany, the latter may be injured through the neutral nations. And since the neutral nations were not strong enough to protect their interests Germany was compelled in defense of her own rights to take the road of retaliation, with the result that the position of the neutrals became worse still.

The unrestricted warfare with which Germany answered the atrocious violations of law on the part of the English, has demonstrated to England that Germany may not be challenged unpunished. We have paid in kind.¹ The war of starvation begins to throw its shadows even in the countries of the Entente Powers, and the Austro-Hungarian minister of foreign affairs, Count Czernin, was able to assure the Hungarian delegation in December, 1917, that those in authority in Germany as well as in Austria knew with a certainty that as a result of the submarine warfare "the interference with the supply of munitions on the eastern and western fronts is so great that it has a decisive influence upon the course of the war and that our opponents suffer from its effects severely." The breaking

¹ Van Calker, "Das Problem der Meeresfreiheit," p. 25; my essay, "Lusitania-Fall," p. 37 ff.

of the convention on the part of the English has given us back the freedom of trade. Thanks to our submarines, we were in a position to make, through our declarations of barred zones, such a use of this freedom as was hardly ever conceived possible by England.¹ Even the vainglorious English prime minister, Lloyd George, is already beginning to lament: "Nothing can give us victory, unless we improve our tonnage problem. Tonnage means cannon, airships, munitions, tanks, and troops, regardless of whether they are in France or in the East."

But the neutrals who were dragged into this joint state of suffering must consider that nothing but their own attitude of toleration compelled Germany to resort to retaliatory measures. We had a right to expect that, since the neutral nations answered the English violations merely with paper protests, the German measures of retaliation would not be judged more harshly.² The American Union, above all, should have taken this into consideration. On the whole, I have nothing to add to my previous arguments concerning the justification of the German submarine warfare.³

The right of blockade and the right of placing mines are touched upon in Article 2 of the convention concerning mines, where it is stated:

It is forbidden to place automatic contact mines in front of the coasts and ports of the enemy for the sole purpose of tying up commercial navigation.

According to this a blockade by means of mines or the blockading of commerce that is directed against the neutral nations and that can be carried out only by means of mines, is forbidden; only the placing of mines as a war operation directed against the enemy remains in force.

Germany added, indeed, a reservation to Article 2, in conjunction with France, but only because of the fact that "the belligerent (who places mines with the purpose in view of tying up commerce) has merely to allege a different reason in order to render illusory the application of this law."⁴

¹ Vollert ("Das militärische Gebiet des Englischen Nordsee-erlasses vom 3ten November, 1914, und das Kriegsgebiet der deutschen Bekanntmachung vom 4ten Februar, 1915," Dissertation of the University of Würzburg, 1917) attempts to prove in a noteworthy manner that there exists a legal coordination between these two announcements, but is unable to come to a conclusive decision because he is unwilling, as a matter of principle, to even consider the question of retaliation. Still his essay contains the most complete up-to-date bibliography on the subject of submarine warfare.

² See also the speech of the Imperial Chancellor v. Bethmann Hollweg delivered before the Imperial Parliament on February 27, 1917.

³ "Der Lusitania-Fall," 1915, p. 37 ff.; "England-Amerika und das Völkerrecht" in Frankfurter Universitäts-Zeitung, "Sonderheft, ihren Studenten im Felde gewidmet von der Königlichen Julius-Maximilians Universität Würzburg" (Special Edition, dedicated by the Royal Julius Maximilian University of Würzburg to its students in the service), 1917, p. 3 ff.

⁴ German White Book issued on December 6, 1917, p. 10.

Loreburn, too, states that there is little sense in forbidding such a practice,

because nothing is easier to maintain than that the mines are intended among other things to render impossible the retreat or provisioning of the enemy in a commercial port and that the interference with trade is merely a deplorable consequence. Such a practice would constitute a highly effective blockade, and it could be proclaimed under a different name without any guarantees and responsibilities.¹

On the other hand, as was shown by the placing of German mines at the mouth of the Thames River, even the strewing of mines intended purely as a military operation could be just as easily characterized and attacked by the opposing side as constituting a commercial blockade. But the latter eventuality is immaterial, for the effects of law upon commerce are neither desired here nor intended; and the war value of a military operation is independent of such an attack, particularly as it rests upon a wrong assumption.

Thus nothing else remains but that Article 2 has absolutely no value, as far as protection of trade is concerned. Such may be the case, but this provision has some value just the same. This is proven by the fact that, unfortunately, the present English closing of the sea by mines, which was unquestionably intended as a commercial blockade, does not seem to be affected by Article 2, because Germany added a restriction to this section. Fortunately this does not matter at all, since a blockade by means of mines is already forbidden in the Paris Declaration of maritime laws through its demands for "effectiveness." For, according to this declaration, a blockade, as has been previously stated, must be enforced by a fighting force (*force suffisante*). And the English closure of the North Sea does not agree with this provision.

During an address delivered at Norwich toward the end of November, 1917, Lord Robert Cecil boasted that "he was in a position to state that in the previous history of the world nothing had been accomplished that could equal the present blockade." He is right, in so far as the illegality and brutality of the English "blockade" are still without their equal.

§ 6. THE POSTULATE OF THE FUTURE.

We have now arrived at a stage where we can attempt to formulate the future demands.

I. In the matter of placing mines a partial understanding had been achieved already in 1915 between Germany and the American Union, still "neutral" at that time, that failed to obtain universal legality

¹ "Privateigentum im Seekrieg" (translated into German by Niemeyer), p. 138 f.

only on account of England's stubbornness. The American note of February 22, 1915, recommended, among other things, as a basis for an Anglo-German understanding,

that neither party shall lay single floating mines in the coast waters or on the high sea; that neither side shall lay anchored mines on the high sea, except for purely defensive purposes, within cannon shot of a port; that all mines shall bear the mark of the Government that placed them; and that they shall be constructed so as to become harmless, as soon as they shall have torn themselves loose from their moorings.

In her answer of February 28, 1915, Germany declared herself in accord with these proposals, with the exception of one point. For it did not seem to her

advisable to *give up* entirely the use of anchored mines as a *weapon of offense*.

In accordance with international law,¹ Germany sees in the placing of mines a war weapon that is not prohibited and that serves for purposes of defense as well as offense, but which, on the other hand, must confine itself to its purely military aims. In this last respect there exists a great gulf between the German and English points of view.

From the standpoint of international law the innovation consisted in the fact that England laid out mine fields purely for the purpose of closing neutral navigation; that she closed the North Sea to such navigation, and that in this way she simply abolished the freedom of the seas in that region. And since this action forced Germany, too, to issue by way of retaliation similar declarations of war zones, the indignation of the neutral nations, as a matter of course, rose to a higher pitch. But the responsibility rests upon the shoulders of England which, through her measures, provoked counter measures and which rejected rudely all offers of mediation.

The German declaration of a barred zone is merely an imitation of the English declaration. But whereas England added violations, extortions, and villainage to the simple closure, Germany found in her ruthless submarine warfare a better way for intensifying the method of blockade. But although England, and likewise America, have much to say concerning the necessity for adaptation to modern conditions, they are not willing to apply this possibility to the case of Germany. The German blockade and submarine warfare are supposed to be inhuman because, unlike the English measure, they are not directed solely against property, but also against the lives of human beings. But I have already pointed out in another place²

¹ Compare the (VIII) Hague Convention of 1907 in regard to the placing of submarine automatic contact mines.

² "England-Amerika und das Völkerrecht," Separate edition of the Frankfurter University Bulletin, published by Blazek and Bergmann, Frankfurt a. M., 1917, p. 8.

that human lives are safe within the English barred zone in view of the fact and to such an extent only, because and in so far as the neutral nations actually avoid this zone. Were they to display the same willingness in the case of the German barred zones, complete equality of conditions would prevail in both instances. However, in the last analysis it is immaterial to those who disobey whether they are sent to the bottom of the sea by English mines or by German torpedoes.

And now we witnessed the remarkable fact that, in view of the danger from mines, American ships have yielded to the English declaration of a barred zone, have suspended maritime intercourse with Germany, giving thereby material aid to the English plan of starvation, whereas they continued, on the other hand, to visit the still more dangerous barred zone which the German Admiralty Board created and brought to universal notice by way of retaliation, thereby hurling themselves into death and destruction, in order to be able to throw out later on the gauntlet to Germany under the pretext of ship catastrophies. Germany accepted this challenge. And in this way we got into war with America.

In the article quoted below I have settled accounts with the American point of view and have nothing further to add to it. The only question before us is, What shall become legal in the future?

The answer to this query was given in advance by Germany, which repeatedly declared herself ready to give up her blockade and unrestricted submarine warfare provided England abandons her criminal plan of blockade and starvation.

With a strong jerk we must again turn the wheel backwards at the peace conference.

England has learned by experience where her illegal demeanor could lead to; she has found her master in the German submarine.

And now we are confronted to-day with a new and peculiar situation. Public opinion in Germany takes it for granted that, in case of defeat, England will be ready to abandon in the future the method of starvation, if she could thereby obtain the renunciation of the German method of blockade.¹ But, thus we read further on, this is only "deceit and crafty calculation." To be sure, it is regretfully stated: "Up to the present time the German Government has not claimed a sovereign independent right to the proclamation of a closed sea that does not have to be first justified as a measure of defense and reprisals." But stress is laid upon the fact that the blocking of communication by means of the unrestricted use of the submarines has become "a legitimate weapon" in the present war. Were Germany to give up her unrestricted submarine warfare, she would never

¹ Siemens, "Die Freiheit der Meere," 1917, pp. 53-55. Similarly Trierpel, p. 38.

become free from the jurisdiction of English supremacy, and, furthermore, she could no longer fall back upon the abandoned weapon in case of necessity. For that reason it is stated further on :

England's return to the Declaration of London or to similar covenants, if once agreed to by Germany, does not mean freedom of the seas for that country. On the contrary, by agreeing to such a return Germany places her approval upon an everlasting lack of freedom. * * * This freedom can not be obtained by means of paragraphs and agreements, but solely by exercising freedom in the use of weapons. As far as Germany is concerned, freedom of the seas and freedom in the use of weapons are synonymous.

I have already rejected considerations of this sort on previous occasions. The submarines are by no means a forbidden war weapon. But a ruthless submarine warfare in conjunction with a blockading of the sea is contrary to law and permissible only from the point of view of retaliation. It consequently loses its justification with the disappearance of the reasons for retaliation. Of course, with the appearance of new conditions of peril, the road would become once more clear for retaliatory measures.

The blockading of the sea or the decreeing of war zones, with and without intensified submarine warfare, are neither justified by existing laws nor can it be conceivable to grant them a legal status. Of course, if upon the disintegration of international law, an agreement concerning its reconstruction should prove a failure, then the whole problem is thrown upon the doctrine of usage among nations, and each State becomes free then to act according to its own decisions. This should be sufficient reasons for the Entente Powers not to bend the bow too much in the course of the negotiations; otherwise they are steering towards a hazardous situation.

II. A distinction ought to be made in the problem of blockade.

No objection can be raised to the so-called war blockade. It constitutes a supplement to siege, an accompanying phase of operations on land. When a sea fortress becomes invested from land the blockade from the sea closes the ring of siege. In the main the blockade grew up from such circumstances chiefly as a weapon of naval warfare. But the greediness of the belligerents increased, and alongside of the war blockade there came into existence the commercial blockade.

1. A commercial blockade, however, is not a military operation directed against the fighting forces and should, therefore, cease to exist. It only tends to bring to a standstill the oversea trade within the blockaded zone by closing and prohibiting by means of a block-

ading squadron the access to neutral ships.¹ A resulting phenomenon of such a strangulation is the exhaustion of the civilian population.

But if this necessary accompanying phase looks suspicious, then we surely have a right to ask: By what right does the belligerent dare to forbid neutral ships the entrance into a foreign harbor? There is nothing strange in the fact that a merchant vessel should meet with a refusal on the actual battle field and likewise in front of a besieged sea fortress; in warfare on land, too, the interests of the passers-by must needs yield to the rights of the belligerents. But the entire activity of the belligerent during a commercial blockade consists merely in the fact that he plants himself before a seaport in order to say to an approaching neutral vessel: "You may neither enter nor depart from here." The core of the right of blockade is rotten; the right of blockade is a defiance of neutrality; it is the legal form for brutal acts of violation against the neutrals and their trade. The commercial blockade originated at a time when the principle of neutrality was not yet developed, and when a belligerent was the leviathan who swallowed everything in sight. It is high time that the principle of neutrality should begin to assert its natural rights. The belligerent presses the neutral nations into his service by blocking commercial intercourse, and he injures them by placing restrictions upon their trade. The practice of confiscation lends emphasis to the application of blockade, and thus the right of capture at sea and the right of blockade pull on the same string; both constitute rights of capture. The belligerent lays his hands upon private property, in one case on the possessions of enemy subjects, in the other, even on the property of neutrals. It is the same spirit, only somewhat more brutal in the right of blockade, because it is directed even against neutral nations. For that reason whoever is in favor of the abolition of the right of capture at sea can no longer defend the right of blockade.²

Sir Ernst Satow, too, the English delegate to the Second Peace Conference at The Hague, admitted that logically the abolition of the right of capture at sea will have to end in the abolition of the right of blockade, hitherto opposed by England; it would be impossible to separate those two questions. For this reason the English delegate confined himself at that time to the statement that England intends to take up the question of the abolition of the right of capture at sea as soon as disarmament shall have been decided upon. At the same time he laid before the Conference on this occasion the English

¹ Enemy vessels are subject to confiscation even without the institution of blockade. The right of blockade would become of practical value to the enemy merchant ships only in case the right of capture at sea were abandoned.

² See also Schramm, "Prisenrecht," 1913, p. 119.

suggestion for the abolition of contraband,¹ which we shall take up later on.

In contradistinction to America, where, at least during President Buchanan's administration in 1859, a strong movement set in in favor of the abolition of the right of blockade, on the grounds that with the abolition of the right of capture at sea the commercial blockade must also cease to exist—the American point of view has in the meanwhile undergone a change—England held from the very beginning the view that the right of blockade must be kept under all circumstances. The instructions of the English plenipotentiaries to the London Conference were to the same effect. Similarly, the secretary of state for foreign affairs, Sir Edward Grey, declared in Parliament shortly before the outbreak of the war, on May 6, 1914, that while it was not in the interest of England "to appear as the chief obstacle to the abolition of the right of capture at sea, the retention of the practice of blockade constituted a *conditio sine qua non* to every discussion concerning a revision of the laws and customs on the sea." The blockade was always a special English form for taking sea prizes, which is easily understood in view of the many and good naval bases of support possessed by England. In this way the presumption of the so-called paper or apparent blockade, which justly received the name of *blocus anglais*, planted itself like a stout snare around all private property on the sea.

The absence of local restrictions in the English system of blockade, which finds expression particularly in the theory of an uninterrupted voyage, and, respectively, in the actually unrestricted sphere of activity, as understood by the English,² completed the picture of English blockade despotism that failed to shrink even from blockading the neutral nations.

The actual law was clearly described by Loreburn³ before the world war when he exemplified the case of an English blockade of the German harbors in the North Sea, expressing in this connection the following view:

In spite of the blockade, Antwerp, Rotterdam, and all the other neutral ports that are connected with Germany by means of railways could receive over-sea goods just the same and reexport them into Germany. On the other hand, Germany could still continue to ship her exports via Antwerp and receive from neutral vessels her imported goods in Antwerp.

He also took for an example the blockading of France in case of an Anglo-French war, again stating in this connection:

Hence, no matter how powerful our navy may be, we can do nothing as long as we do not blockade simultaneously Ant-

¹ Protoc. III, 788, 852.

² England had no regard for the right that was precipitated in Article 17 of the London Declaration of maritime laws and customs.

³ Translated into German by Niemeyer (*Privatrecht im Seekrieg*, 1914), p. 90.

werp, Lisbon, and Genoa, which, of course, would be equivalent to a declaration of war against Belgium, Portugal, and Italy. We would even have to go further; with similar consequences we would have to blockade all ports of the mainland; we would have to declare war against the whole of Europe. This supposition is absurd, but it proves, nevertheless, that even if our blockade were absolutely tight, all the goods needed by our enemy could certainly be brought into a neutral port and transported thence over the railroads to any other point of the mainland.

What is defined here as an insipid supposition has become the sad truth in the world war. England has carried out her alleged blockade in such a manner that it should have had the effect of a declaration of war against the neighbouring States, even of a war challenge to Europe.

But the affected neutrals were satisfied with protests on paper, and, when Germany, suffering greatly from the English violations of law and from the patient toleration of the neutrals, took recourse to the principle of self-help and enacted reprisals from which the neutrals, too, had to suffer, then America declared war, not, as one had a right to expect, against the English, but against the Germans, who were already hit hard by the brutal violations of law.

England had little regard for any law whatever, but simply represented the selfish point of view, without being in the least disturbed in it by America. "What does it avail us," thus declares the English note to America of July 23, 1915, "that we blockade the German ports, if Rotterdam, for example, is the nearest port of exportation for several German industrial centers?" But I maintain a question of right and not a question of utility is to be decided here. "Is it, perhaps, useful" to neutral Holland that her ports remain closed contrary to law? Must Holland yield to a violation of law because such a violation is useful to England? Here we have the naked point of view of might which has been the characteristic trait of the English policies since times immemorial, while at the same time the English Government announces publicly the watchword: "Subordination of might to right," in order to confuse public opinion. But America, which has always played before the whole world the rôle of the guardian of international law, has shown a surprisingly deep understanding for English arrogance. In its notes of March 5 and March 30, 1915, the Union Government has indeed left no doubts in the minds of the English that it does not consider the English closing of the sea a real blockade, but—thus it stated—under the methods of present-day warfare, particularly in view of the submarines and airships, it has become physically impossible to maintain a tight blockade. However, the radius of action must be restricted, and neutral vessels must be permitted to pass through the blockading ring

at least to neutral ports. But even this remained a platonic demand. This self-same America, which failed to evince the least understanding of the peculiar position of the submarines, to which no objection can be made from the point of view of international law,¹ and of Germany's attitude of retaliation, agrees in this case to the theory of adaptation to conditions, accepting thereby—though in a somewhat modified form—the English “blockade adapted to the conditions of modern war and commerce.” For that reason I demand in the first place absolute abolition of the commercial blockade.

II. But if this should not prove feasible, then the blockade of commerce must at least be reduced again to the legal basis of the London Declaration of maritime laws. In accordance with this declaration the following minimum demands should be formulated:

1. The blockade must be limited to enemy ports or to ports and coasts occupied by the enemy;² neutral countries and harbors must not be drawn into the blockaded circle.³

This ought to apply “regardless of the interest which a belligerent may possibly have in it,⁴ on account of the importance of this neutral port to the matter of provisioning the enemy.”⁵

2. The blockade must be conceived as nothing else but a “temporary military occupation of a sea territory”⁶ or as an “effective military siege.”⁷ From this follows the necessity for a strictly local application; the demand for effectiveness⁸ and the rejection of the theory of an uninterrupted (continuous) voyage.⁹

It is high time that the neutral nations obtained their rights. A neutral is not permitted to render military assistance to either side, and in return he ought not to be exposed to attack by either belligerent faction. It is quite conceivable how a neutral may have to yield to a blockading squadron that is engaged in a military operation.

If the vessels of the neutrals throw themselves between the combatants, as happens, indeed, when they attempt to run an effective blockade, then they have no right to complain, in case they become the victims of warfare. If one places his fingers between the door and the hinge, he will naturally have his fingers smashed. The neutrals can not expect that the combat shall be interrupted or restricted on their account.¹⁰

¹ See my essay, “Haager Friedenskonferenz,” II, 576 ff.

² Declaration of London, Article 1.

³ *Ibid.*, Article 18.

⁴ That is to say, in blockading of a neutral port.

⁵ “Interpretations” to Article 18.

⁶ Liepmann, “Die Freiheit der Meere,” in *Deutsche Juristenzeitung*, 1917, Nos. 21–22, Sp. 925.

⁷ Niemeyer, “Prinzipien des Seekriegsrechtes,” 1909, p. 24.

⁸ Article 2 of the London Declaration of maritime laws and customs.

⁹ *Ibid.*, Article 17. See Hanseemann, “Die Lehre von der einheitlichen Reise im Rechte der Blockade und Kriegskonterbande,” Dissertation of the University of Würzburg, 1910.

¹⁰ Niemeyer, “Prinzipien des Seekriegsrechtes,” 1909, p. 28.

Similarly, in warfare on land the non-participants have no claim to unmolested access to the field of operations; the same principle applies in our daily life and is taken for granted: If we do not wish to become involved in a brawl we had better keep away from a fighting crowd.

But outside of the fighting arena freedom of movement exists and the interests of the neutral nations calls for consideration.

If during a war between Russia and Japan Norwegian ships may be seized because they have received orders to sail for certain East Asiatic ports which were proclaimed to be in a state of blockade at the time of their departure, then this constitutes interference with neutral trade, which is just as unendurable as it is useless.¹

Niemeyer is right: The theory of a continuous voyage is "a bluff for the purpose of covering up one's own weakness through an artificially created fear among the neutral nations."²

Nevertheless one can snap his fingers at the demands for effectiveness, even in view of the extraordinary elasticity of the sphere of activity that is so greatly favored in England.³ The official elucidations endeavoured to supply the definiteness that is lacking in Article 17 of the London Declaration of the laws and customs in maritime war, in the spirit of the French interpretations, which were declared to be "the best commentary." But in the last analysis we have here only "a beautifully styled phrase,"⁴ which contributes very little to a better understanding and which offers but a weak protection against English abuses.

¹ Niemeyer, *op. cit.*, p. 25. He is also right in stating further on: "On the other hand, only such a belligerent takes no interest whatever in the theory of a continuous voyage, who does not intend or who is not in a position to take seriously the principle of an effective blockade. For, whoever has proclaimed a real blockading ring, is absolutely certain that no neutral ship will be able to spoil his plan. Why should those warships waste their time in searching neutral vessels for passports so far away from the line of blockade? Such a procedure is a pure waste of energy and provokes neutral opinion."

² *Op. cit.*, p. 26.

³ Article 17 of the London Declaration of the laws and customs in maritime war.

⁴ Loreburn-Niemeyer, p. 84.

CHAPTER III.

THE RIGHT OF CONTRABAND.

SECTION I.—THE ONE-SIDED POINT OF VIEW.

§ 7. THE EXAGGERATION OF THE RIGHT OF CONTRABAND.

I. The freedom of the sea or the over-sea trade of the neutral nations is threatened more by the right of contraband than by that of blockade.

The right of contraband, too, found its previous covenanted regulation in the London Declaration of 1909 of the laws and customs in maritime war. The introductory section reads as follows:

The signatory powers are united in the declaration that the regulations contained in the succeeding chapters agree essentially with the universally recognized principles of international law.

The official interpretations emphasize the fact that the conference had for its object above all "to determine, define clearly, and to supplement, as far as necessary, the principles which could be regarded as laws established by usage." The accurateness of this conception may be a debatable question.

How seriously the German Government took the London resolutions and how disinterestedly it set to work is proven above all by the fact that, immediately upon the adjournment of the London Conference, it enacted an "ordinance concerning sea prizes," into which were embodied all the London conventions in full, and the provisions concerning contraband taken over literally. This ordinance received the imperial sanction as early as September 30, 1909—that is to say, fully two years before the London Declaration of maritime laws came up for discussion in the English House of Lords. Furthermore, in spite of the unfavorable attitude of the English House of Lords, but in expectation of a more welcome reception at the hands of the enemy Governments, it was proclaimed immediately after the outbreak of the war, on August 3, 1914, in the *Reichsgesetzblatt*, page 275.

This law regarding sea prizes was to be in force in every war, according to the German point of view, as is proven by the mere date

of its promulgation; hence, no intention was lurking in the German minds to keep a back door open against the English. The London Declaration, as demanded in the concluding chapter, was to form "an indivisible unit," and, for that reason, the German ordinance concerning sea prizes refrained from making any changes, merely confining itself to interpretations and explanations.

II. The attitude of the Entente Powers, on the other hand, was entirely different.

Whereas the German Government, upon the outbreak of the war, agreed at once and unconditionally to the American proposal to use as a basis the London Declaration of the laws and customs of maritime war, and while the French and Russian Cabinets also let it be known in London that it was desired to act as far as possible in accordance with the London Declaration, the English Government could not refrain from proclaiming the acceptance and validation of those laws and customs only conditionally, depending upon the enactment of certain additions and changes that were enumerated in detail, and thereby determined in an authoritative manner also the policies of its Allies. And these additions and changes multiplied within a short time to such an extent, that eventually the whole London Declaration was turned upside down, with the result that the Declaration of Paris, too, lost its validity. Finally, it was not even considered necessary any longer to "save the appearances," and on July 7, 1916, England served formal notice of her renunciation of the Declaration of London. In this the English Government followed the advice of Lord Portsmouth, who, in December, 1915, declared in the English House of Lords:

We must rid ourselves of the whole trash of the London Declaration, of the Hague Conventions, and of all legal fine points, and instead give precedence solely to the interests of England and of her Allies.

The attempt to starve out enemy nations under the cloak of the right of contraband is an English criminal specialty, and did not make its appearance for the first time in the present world war.¹

Of course, such a design can not be carried out by means of the right of contraband alone. The right of contraband must be first thoroughly twisted and brought to a high-water mark of effectiveness through other violations of law. And this was by no means difficult for England.

From the very beginning England based her plans of operation upon the policy of starving out Germany, and hence, upon a criminal

¹ It can be seen after reading Loreburn's essay that England tried to apply this method in former days also to France. For thus he states on p. 105: "A long time ago Great Britain announced her intention of confiscating as contraband all foodstuffs consigned to any French port, on the grounds that there is a prospect of subduing France by means of starvation."

act. The Anglo-American conception of war¹ which caused a division of opinion already during the work on Article 23h wipes out the distinction between fighting forces and peaceful population, treats even the latter as an enemy, and threatens it with war and destruction. Consequently, the restrictions imposed upon the right of contraband were brutally swept aside, the free list was shortened until it disappeared entirely, the all-important distinction between absolute and conditional contraband was done away with. Everything going to Germany or exported from there, even the German bunker coal with which a neutral vessel keeps its boilers going, is liable to confiscation. Every neutral ship is forced to run into an English port, where it is subjected to a search; and this search is being aided by an unheard-of system of espionage practiced by England in all parts of the world. Not only is all over-sea trade with Germany rendered impossible, but also all supplies going to neutral States are supervised, and a system of rationing is enforced that constitutes a most serious menace to the very existence of the neutral countries. All neutral countries are placed under English control; and the supervising agencies established in every port of the neutral States exercise with severity the duties of their cruel office. Complete paralyzation of neutral commerce and loss of neutral self-determination, oppression, and compulsory servitude are the results of the English contraband policy. Moreover, for the purpose of removing their own shortage of tonnage space, the Entente Powers are detaining neutral vessels, they intercept neutral ships on the high sea, subject them to a change of flags, and compel them to sacrifice themselves to submarines, extort delivery contracts, and enforce voyages under unheard-of conditions. Never before has the world witnessed such an abuse of the neutral nations.

But let us overlook the brutalities against Germany and let us consider for a moment the interference with the export of neutral States. In his book, "The Principles of the Law of Maritime Warfare" (*Prinzipien des Seekriegsrechts*),² which appeared in 1909, Niemeyer considered it doubtful in the highest degree whether large countries with a considerable export in corn, as, for example, the United States of America, would ever permit that its peaceful trade should be destroyed on account of the conception of contraband.

Whoever intends to treat the American corn export into England according to the conception of contraband would undoubtedly have to be sure first of American compliance, which would not only mean a political shifting of a most serious char-

¹ Compare particularly Mendelssohn Bartholdy, "Der Kriegsbegriff des englischen Rechts," 1915, and also "Der Gegensatz zwischen der deutschen und englischen Kriegsauffassung und seine künftige Überwindung im Völkerrecht" (address delivered on October 7, 1917, at the meeting of the German Society of International Law (*Deutsche Gesellschaft des Völkerrechts*), held in Heidelberg).

² See p. 51.

acter, but which could be imagined only in the sense of a direct participation in the war on the part of America. To prohibit against America's will, the American corn export to England would mean war against America. And a similar condition would arise in the case of every neutral State unless that State should happen to be so weak as to feel compelled to yield to any act of injustice.

And yet America's export during the world war was hit hard by the contraband proclamations; England prohibited the exportation of American goods to Germany. And America did declare war, but not against England, which decreed the laws of contraband, but against Germany, which, through her measure of retaliation, tried to force the violator and enemy of commerce back into the path of law and justice. Such is American logic!

The English application of the right of contraband with all its consequences constitutes the saddest chapter in the world war. It resulted, in the first place, in the enslaving of the seas. The English sea tyranny weighs heavily on the neutral States; their independence has been destroyed, the freedom of the sea is no longer merely restricted, but has become a dead letter. The fact that Germany through her submarine warfare was in a position to retaliate for the English violations that cry to heaven for revenge, has added unfortunately new sufferings to the neutral States. Germany has repeatedly declared herself ready to discontinue her retaliatory measures if England would again follow the path of law; but all in vain. And now England, faithfully echoed by the Entente Powers, fills the world with the cry against German "barbarism." The Englishman, after the manner of the Pharisee, sees only the splinter in somebody else's eye, but not the beam in his own eye. The English Government, after having taken away the character of feasibility from the convention in regard to the holding up merchant ships on account of the universal practice of arming its merchant vessels, is apparently shocked at the torpedoing without warning of ships that persist in traversing a designated zone of danger in spite of a general warning not to do so. But when the old men, women, and children of a whole nation die slowly under the tortures of insufficient nutriment without the privilege of choice, when particularly the entire future of a nation is dealt a mortal blow at its very roots, then the moral feelings of the Entente and especially of the American enthusiasts of humanity are not sufficiently deep to appreciate this calm martyrdom. Instead of exercising strong pressure upon England to compel her to abandon this illegal and immoral plan of starvation, whereby the unrestricted submarine warfare would have ceased automatically, the President of the American Union, still "neutral" at that time, who flooded the world with didactic apophthegms, but who at the same time remained the tool of the contract-

hungry American moguls of finance, constantly worrying over their pay, was merely interested—to use an expression of the American Henderson—in watching America grow fat serenely on this blood money. And now comes Wilson, who constantly talked of peace only, but at the same time kept war in the folds of his toga, until finally he pitched into it head over heels, and declares that no peace will be concluded unless Germany, against whom hell has united into a conspiracy, shows repentance on account of her defense and is ready for atonement. And pending the arrival of such a time, this peculiar man who was reelected President only because of his pacifism, tries to imitate the famous English example in forcing the neutral nations of the entire world into the war or in protecting them to death with the whip of starvation. The Entente Powers, on their part, by a shameless twisting of the most obvious facts, seek to impute to the German Empire their own lust for conquest that is being constantly exposed, and to cover up their unprecedented acts of violence with a nauseating torrent of phrases about justice and liberty.

In their systematic campaign of lying the Entente Powers have set up a powerful wall of beautiful phrases in support of their imperialistic policies; but the time will come yet when history will tear a hole in this wall, through which mankind will perceive with horror how treacherously it had been swindled.

§ 8. THE NEUTRAL POINT OF VIEW.

The present application of the right of contraband simply makes the neutral nations outlaws on the sea. It is perfectly clear that these conditions are intolerable and that they can never be perpetuated legally. Even England would strike up a scornful laughter, as a neutral, were some belligerent to attempt later on to pay her in the same coin which the English Government put into an enforced circulation during the world war.

As a first step the complete abolition of the institution of contraband will have to be considered.

I. As a matter of fact, attempts of this kind have been made by several States even before the world war.

On July 28, 1856, the United States in a note of Secretary of State Marcy proposed, in addition to the abolition of the right of capture at sea, also a prohibition of contraband, to be sure, with a retention of the right of blockade. We know, however, that in reality nothing will be gained as long as the “unholy triunity” as much as even emphasizes her character of unity. For, in that case the former differentiating spirit of prize will simply reveal itself under one single name. Moreover, America has changed once more her previous attitude.

However, the greatest surprise was created when England herself—in accordance with a previous proposal of Lorimer—stepped forth at the Second Hague Peace Conference during the first session of the IV Commission, on January 24, 1907, with a suggestion for the repeal of the right of contraband.¹ In support of its adoption, Lord Reay argued that this proposal, if accepted, would do away with the burdensome right of search which, under the new conditions, would change into the right of merely establishing the neutral character of a merchant vessel.²

But at a vote taken in the IV Commission, on July 31, 1907, the following countries voted against the English proposal: Germany, France, Russia, the United States of America, and Montenegro; Spain, Japan, Roumania, Panama, and Turkey refrained from voting.³

In view of this result the question was not pursued any further.

The experts did not permit themselves to be browbeaten; they knew that England would fare splendidly with the "adapted" rights of capture at sea and of blockade. England, however, was not to be discouraged so easily; she held a "surrogate" in reserve and endeavored to introduce the "auxiliary vessel" idea in place of contraband. Thus, during the discussion concerning the transformation of merchant ships into vessels of war, the English delegation proposed⁴ that two kinds of war vessels be henceforth distinguished—fighting ships and auxiliary vessels.

According to this proposal such "*enemy as well as neutral merchant vessel*" was to be regarded as an auxiliary ship,

that is used in the transportation of seamen, war materials, fuel, foodstuffs, water, or war supplies of any other kind, or that is intended as a workshop vessel or for the transmission as well as for the collection of intelligence, in so far as it is compelled to obey the sailing orders given to it directly or indirectly by the war fleet. Similarly each vessel serving as a transport of troops shall come under this definition.

All vessels of this type are simply to be considered vessels of war "as giving hostile aid to the enemy" (*comme prêtant une assistance hostile à l'ennemi*).⁵

England desired in the first place to strike at the vitality of that fleet which, having no bases of support of its own, is compelled to

¹ The proposal read as follows (III, 742, 1156):

"In order to avoid the difficulties that grow out of war for the commerce of the neutral nations the Government of His Majesty the King of England is ready to renounce the principle of contraband in war with those powers who will conclude an agreement to this effect. The right of search will be exercised, with the sole object in view of establishing the neutral ownership of a merchant vessel."

² III, 742.

³ Protoc. III, 881. Concerning the discussion see Schramm, "Prisenrecht," p. 209 ff.

⁴ The proposal is reprinted in Protoc. III, 1135.

⁵ Lord Reay, Protoc. III, pp. 848 (862-864).

rely upon importation and convoys. All supply vessels were simply to be treated as warships and to fall prey to the hostile fleet without a prize-court procedure.¹ By driving all supply vessels out of existence new difficulties would have been placed in the way of the transformation of merchant vessels on the high sea.

England, apparently, was not interested in the question of access to enemy ports. However, she would have certainly held up the neutral vessels in order to assure herself and to be able to claim that their cargo was intended to supply the needs of the enemy fleet. But above all, the English fleet would have throttled later on the enemy country by a strict application of the rights of capture at sea and of blockade; and all this would have been accomplished after the formal repeal of the right of contraband.

At the special meeting of the executive committee which was charged with the duty of defining clearly the new conception of auxiliary war vessels, it was distinctly recognized that it merely signified the reappearance of the principle of contraband in a different form, acceptable particularly to England;² hence the English plan fell through.³ The English delegation withdrew the proposal, giving the remarkable explanation that it was premature and, inasmuch as the question was not included in the program of the Conference, it would have to be presented before a future conference.⁴ However, all that seemed useful in this proposal, as far as it related to neutral vessels, was embodied later on in the Declaration of London, in the third chapter, "Unneutral assistance," in Articles 45-47. And the right of contraband itself was retained by the Declaration of London and even underwent a thorough elaboration (Articles 22-44).

II. More recently German representatives of the science of international law, following the example of Cocceji,⁵ have also demanded the complete repeal of the right of contraband. This was particularly demanded by Liepmann,⁶ who represents the view that the differentiation between absolute and conditional contraband is no longer consistent with the realities of modern warfare and life. He states that it is particularly no longer practicable to distinguish, in

¹ This was particularly pointed out by the American delegate, Porter (III, 849).

² The report of the commission (III, 863) emphasizes: "The hostile character recognized in vessels carrying munitions, fuel, foodstuffs, etc., it is necessary to point out, would mean nothing else but the sanctioning of the idea of contraband, and this would be in direct contradiction to the proposal made by Great Britain to abolish this principle entirely." (*Le caractère hostile reconnu aux navires transporteurs de munitions, combustibles, vivres, etc., a-t-on fait remarquer, ne serait autre chose que la consécration de la notion de contrebande—ce qui paraît en contradiction avec la proposition, faite d'autre part par la Grande Bretagne, d'abolir cette notion.*)

³ For a report of the discussions see Schramm, "Das Prisenrecht," p. 256 ff.

⁴ Protoc. III, 917 (Lord Reay).

⁵ "Elementa iustitiae naturalis et romanae" (Elements of Natural and Roman Law), 1740.

⁶ "Die Freiheit der Meere" in *Deutsche Juristenzeitung*, 1917, Nos. 21-22, Sp. 926.

these times of the strictest application of the principle of universal military service and especially of the law of auxiliary service, whether the foodstuffs are intended for the army or for the peaceful population.

As a matter of fact, the world war has shown that commercial warfare without hastening in the least the end of the combat eventually destroys also the trade and economic conditions of its originator and under all circumstances shoves into the background the interests of neutral States in a most irresponsible manner.

The destruction of private property on the sea and in the colonies, the liquidation and destruction of prosperous enterprises, the annihilation of the fruits of endeavour of whole generations, in short, every measure of economic warfare, show their consequences for a long time after the war. And in view of the indissoluble, universal economic relations between the civilized States, in view of the community of interests that exists among the nations of Europe and their fight against Asiatic and American competitors of the future, the present senseless destruction of economic values must also affect those who have wrought it. Hence, in the last analysis the fight for the freedom of the seas demanding a future abolition of the rights of capture at sea and of contraband means also the protection granted to Europe for values, for the loss of which we ourselves can never be reimbursed.¹

Even before the world war Niemeyer directed his sharpest legal attacks against the right of contraband and declared that the right of contraband is incompatible with the principle of neutrality. In his opinion the right of contraband constitutes, just like the theory of a continuous voyage in the right of blockade, an invalidation of the principle of effectiveness, which is demanded of the right of blockade. For that reason he maintains:

The acceptance of the right of contraband of war means: You are unrestricted in the definition of war contraband. Consequently, through a proper handling of the meaning of war contraband, you may evade the demands imposed upon blockade. By overstretching the right of contraband you may achieve approximately the results of an effective blockade that would otherwise be either impossible for you or else highly inconvenient. And by exercising as much as possible the right of contraband you may even surpass, under certain conditions, the imperfect, because locally restricted, effect of an efficient blockade.²

As a matter of fact, England, unable to blockade Germany effectively in the world war, attempted to tie up our arteries of life by declaring foodstuffs absolute contraband. Thereupon the United

¹ Liepmann, *op. cit.*

² "Prinzipien des Seekriegsrechts," 1909, p. 28.

States, frightened by the threatening danger of confiscation, suspended all exports to Germany. Niemeyer is right in asserting:

The right of war contraband (with or without the theory of continuous voyage) is on the same line as the principle of a continuous voyage in the right of blockade. The effect of both institutions lies mainly in their deterring power. By means of a mandatory law, one may even say by means of a legal trick, it is attempted to prevent with a partial success that which can not be prevented or is a great deal more difficult to prevent by means of an effective application of military weapons. The belligerents call upon the lawyers to aid them, so that these may add to their power by using professional mysterious remedies, and in this respect the magic formulas 'continuous voyage' and 'war contraband' have proven themselves highly useful.¹

It is admitted that a neutral vessel which sails into the firing zone of the combatants must suffer the consequences. But, as is stated admirably by Niemeyer, "the confiscation of neutral property outside of the field of combat is an entirely different matter. This, according to the natural, nonlegal point of view, constitutes purely and simply an act of hostility against the neutral nations."

I, too, must ask: How does it happen that international law compels the neutral nations to pay the costs of the belligerents?

The whole idea can be explained historically only. It is a reminiscence of those days when the conception of neutrals in war ('*medii in bello*') had not yet been found. It rests upon the supposition that the neutrals must agree to everything that happens to suit the belligerent. But this is contrary to the leading thought of the principle of neutrality which is based upon the idea that the belligerents are supposed to carry on the combat only among themselves and to respect the neutrals.²

This applies also to war materials, hence to objects of absolute contraband. Niemeyer claims that the large wharves, the arms and munition factories, the numerous industrial and commercial enterprises that are dependent entirely or mostly upon the demand for war materials, would be outright deprived of their means of livelihood, were they not permitted to supply the belligerents.

No one can fail to recognize the weight of the arguments that have been put forth here. With the complete abolition of the right of capture at sea, the contracting business in war would also lose its unneutral tang which in the practice of contraband must be more or less accepted, and which can assert itself to an intolerable degree. For that reason I, too, should like to advocate in the first place the complete abolition of the right of contraband. The neutral nations would again enjoy their full liberty and would be compelled no longer to contribute to the costs of warfare. Further-

¹ *Ibid.*

² *Op. cit.*, p. 29 f.

more, entanglements would be almost precluded under such conditions of freedom; the sea would become free in reality.

But is our present generation ripe for such a degree of freedom? Considered from the point of view of the belligerent, too much, perhaps, would be expected of him, were he asked to look suddenly with complaisance upon a clearly evident aiding of the enemy by means of shipments of war materials.

At any rate it would seem advisable to provide also a minimum program and to hold in readiness a proposal for a compromise.

Triepel is, perhaps, right when he says: "As matters stand now, there is not the least prospect in sight that the right of contraband may disappear completely, now or later, from the laws of warfare. No belligerent will allow himself to be deprived of the right not to interfere as much as possible with the transmission to his opponent of at least war materials, hence of so-called absolute contraband wares."

If this idea is permitted to have its effect, then a conciliatory solution will be aimed at which would take into consideration the difference between absolute and conditional contraband, but in such a manner that the interests of the belligerents and of the neutrals would appear evenly balanced.

Individual states, in their preparatory memoranda to the London Conference, have already sacrificed the right of conditional contraband.¹ But no one was willing to give up the principle of absolute contraband. This will have to serve as a basis for the compromise program which, unlike the maximum program, does not do away with the whole idea of contraband, but merely aims at improvements within the right of contraband.

SECTION II.—AN ADJUSTMENT OF INTERESTS.

§ 9. THE LEADING PRINCIPLE.

Earl Loreburn, to whom it was my privilege to refer several times, has also worked out the problem of an adjustment of interests.²

After bringing to light the weak points of the right of contraband, and after describing the unsuccessful efforts made by England in behalf of its abolition, he turns to the problem of reform. He begins by referring to a statement made by one of the American delegates to the Second Peace Conference at The Hague, to the effect that, while America voted, indeed, against the abolition of the right of contraband, she was not opposed to restricting this right only to

¹ France and Italy have no longer mentioned conditional contraband in their memoranda; Austria, Spain, and Holland have explicitly rejected it. Compare Schramm, "Prisenrecht," p. 228.

² pp. 102-129.

objects of absolute contraband, as was already advocated in the first declaration of armed neutrality (1780).¹ Loreburn emphasizes:

This in itself would already constitute a tremendous step forward, not so drastic and complete as the British proposal, but nevertheless a step of decisive importance for all commercial interests of the world, since materials that are used exclusively in warfare form but a very small part of the wares that are transported across the sea. The usual oversea trade would then remain free from all molestations.²

The sensible basis for the interdiction of contraband, so he declares further on, is always taken from the principle of absolute contraband; and other, by no means logical, nay, even absurd, definitions revealed in a like manner the intentions of the various States to hold on to the principle of the right of contraband, in so far only as it involves articles that are used exclusively in warfare.³ Then he goes on:

Our delegates were correct in maintaining that the right of contraband constitutes an interference with neutral commerce which stands in no relation whatsoever to the interests of the belligerents. However, it may be that the unfavorable attitude of the leading powers who opposed us during both conferences can not be overcome entirely. In that case an effort in the direction of the American proposal might have, perhaps, been successful, in spite of the fact that thus far it was defeated outright. * * * In accordance with this proposal all materials used in warfare only would have remained liable to confiscation, whereas all articles that are used for peaceful purposes also would have been protected. To be sure, abolition alone would not have removed all difficulties, but it would have at least reduced greatly the number of controversies. Furthermore, it would have taken into consideration the previously described feeling of resentment toward a trade which in difficult times of war embitters the combatants in the highest degree. For that reason we ought to receive it with open arms.⁴

But Loreburn goes even a step further. Inasmuch as up to the present time there exists a rule forbidding the departure from a port of embarkation of armed ships, he also favors the enactment of a law against the exportation of all articles that constitute absolute contraband.⁵ Of course, thus he states, it would have to be made perfectly clear that no State is to be held responsible for exportations that take place in good faith and with appropriate caution. However, Loreburn is exceedingly cautious in this respect, and is of the opinion "that this subject needs careful deliberation."

¹ p. 119.² p. 119 f.³ p. 124.⁴ p. 126 f.⁵ p. 127 f.

But in case it should prove impossible to obtain even the abolition of conditional contraband, Loreburn proposes "as a last resort" to keep at least foodstuffs on the free list and, if no other way can be found, to substitute the principle of deprivation in place of that of seizure.¹ For, thus he declares, "when a belligerent is compelled to pay for whatever he takes he will take no more than is absolutely necessary."

So much for Loreburn's plan of deprivation, which had been proposed long ago by others, too. Thus the Prusso-American agreement of 1828 replaced the practice of seizure with that of expropriation. But I consider this method as of little practical significance here as in the right of capture at sea. It would only mean a hoodwinked abolition of the right of contraband. If the Governments are once for all really opposed to the abolition of this practice, then it does not matter at all in what form the abolition is proposed. But if the retention of some right of contraband is still considered necessary, then new and additional definitions will not be able to render it void again. Niemeyer states: "The right to indemnities would weaken its deterring effect, and is for that reason contrary to the conception of the rights of war contraband and of blockade."²

I accept, however, Loreburn's other suggestions. Besides—and this holds good also for all other previously discussed parts—I had formulated my own conclusions independently of Loreburn. I find that I shall have to make a confession. To my regret, his important essay came into my hands as late as November, 1917, after my own pamphlet had been completed. However, I considered it desirable to let Loreburn speak in his own words as much as possible. This could be done by simply inserting all required passages; my own arguments could stay unchanged. Even the plan for an adjustment that is discussed in the succeeding pages was worked out in the same manner, and not the slightest additional changes were made.

§ 10. ABSOLUTE CONTRABAND.

A formal contraband law exists only since the development of the principle of neutrality. The shipment of contraband goods, even if, like any other trade, it is of personal advantage to the merchant only, may nevertheless, and depending upon the nature of the goods, assume the function of war assistance, in which case it has the effect of taking part in the hostilities, and for that reason the offended party combats it with measures of her own. To be sure, the contro-

¹ p. 128 f.

² Niemeyer, "Prinzipien des Seebeuterechts," p. 22 f. Just the same Niemeyer arrives at the conclusion (p. 30) that it would be well "to simply reject the right of war contraband and to grant to the belligerents nothing but the right of expropriation."

versy is still raging around the question whether the right of contraband is a part of the principle of neutrality.¹

I. It is true that, according to existing laws, a neutral Government does not commit a violation of the laws of neutrality by tolerating the shipment of contraband goods by its citizens. Consequently, as far as this is concerned, the right of contraband does not constitute a law of neutrality. But the belligerent faction which is adversely affected by the shipment may confiscate the contraband cargo, including all the merchandise belonging to the owner of the contraband,² and in proportion to the bulk of contraband goods, even the vessel itself.³ Such "shipments" by neutral individuals are by no means criminal acts. Furthermore, they are not regarded "as acts in favor of one belligerent according to Article 17b";⁴ hence they are not placed in the same category with a voluntary act of war service. Nevertheless they are felt to constitute a sort of injurious partiality which may be met by the affected belligerent with confiscation—that is to say, with measures of reprisal or self-defense—without making himself in the least liable to an otherwise customary intervention on the part of the Government.

In these respects the law of contraband is a peculiar phase of the right of neutrality. Prevailing opinion holds, indeed, to the view that the shipper of contraband goods does not intend to injure the opposing side but merely desires to transact business; that the shipment of contraband is merely a business risk, a commercial transaction which is exposed to the danger of confiscation. Nevertheless contraband is liable to confiscation only because the opponent considers himself injured through the shipment. And each one-sided injury or partiality, is contrary to the laws of neutrality: for, according to the idea of contraband, not the intention of the shipper is taken into consideration but the effect of the shipment.

The prevailing view that, without exception, only Governments can have international relations and can violate international law, is not tenable.⁵ There exist, as we have seen from the convention concerning the rights and duties of neutral States and individuals in land warfare, not only neutral States but also neutral individuals. And that the latter, too, can commit a breach of international law which may call for international vengeance, is expressed in Article 9 of the agreement concerning the treatment of wounded in

¹ See Schramm, "Prisenrecht," 1913, p. 204 ff.

² This is the English point of view of "contagion or infection of contraband."

³ Declaration of London, Articles 39-42.

⁴ Convention concerning the rights and duties of neutral States and individuals in land warfare, Article 18.

⁵ Compare Rehm, "Untertanen als Subjekte völkerrechtlicher Pflichten" in Zeitschrift für Völkerrecht und Bundesstaatsrecht, 1907, I. 53 f.

maritime warfare as well as in the superscription "hostile assistance" (assistance hostile) that is given to Articles 45-48 of the London Declaration of the laws and customs of maritime war.¹ But if the so-called analagous contraband constitutes a form of aid that is contrary to the spirit of neutrality, then how much more does this apply to actual contraband? On the other hand, the (not ratified) Hague agreement concerning war prizes gave to the interested parties, in cases of an illegal seizure of vessel and cargo, an independent right of complaint before an international prize court, in order to enable them to press effectively their international claims for indemnification,² thus recognizing them in this respect as individuals before international law.

Thus the fact remains: By shipping contraband goods to the enemy a subject of a neutral country becomes guilty of a breach of neutrality which is punished with confiscation and against which there exists no international protection by means of intervention.

The Dutch declaration of neutrality of August 27, 1914, lends expression to this state of affairs by proclaiming the principle that those who transport war contraband for the belligerents "will have to suffer all consequences arising from it, without being able to claim in this regard any protection whatsoever or intervention on the part of the Dutch Government."³

II. It is clear that, according to the idea of contraband, goods whose use for war purposes is firmly established—in other words, goods constituting so-called absolute contraband—are subject to confiscation. However, I go even further and am of the opinion that it is not enough to guarantee to the enemy in such cases the right of confiscation, authorizing him thereby to resort to measures of self-defense and, as a consequence, to engage in chasing after contraband, which phase of the war is, moreover, bound to be accompanied by the most unpleasant consequences for the legitimate sea commerce. But, inasmuch as such shipments are felt to be a breach of neutrality, international law ought to impose directly upon the neutral Governments the obligation to prevent the shipment of such contraband goods. And in case a Government tolerates the exportation of absolute contraband from its sphere of sovereignty, then it alone should be held responsible for such a breach of neutrality. The place of facultative public prohibition of exports should be taken by an obligatory international law against shipment. This would be my first suggestion, and it brings us to a fundamental question of the law of

¹ The "interpretations," too, establish the fact that a merchant ship "violates the laws of neutrality and gives aid to the enemy through the shipment of contraband and infraction of the right of blockade."

² Article 4, §§ 2, 3; Article 5. See also my essay, "Die Klagen von Privatpersonen gegen auswärtige Staaten," 1914, p. 41.

³ Article 18, III.

neutrality into which the right of contraband would have to be incorporated more firmly. According to Article 6 of the Hague Convention defining the rights and duties of neutral States in maritime war, a neutral power itself is not permitted, indeed, to give up or deliver war vessels, munitions, or any other war materials, not even indirectly; but under Article 7 and in agreement with the Hague Convention, concerning the rights and duties of neutral States and individuals in land warfare, a neutral Government is not obliged to prevent the exportation or passage of arms and, in general, of all such materials as can be of service to an army or navy; it is, therefore, not charged with the duty of opposing also the private shipments of its citizens. Of course, it may, according to the State laws, proclaim an embargo against exportation and through passage; but international law does not compel it to do so.

On the basis of this practice, the American Union had the freedom of choice at the outbreak of the war. On account of the conditions arising out of the world war, America became the only potential purveyor of arms. In the hands of America lay the choice of a speedy peace. We know how President Wilson, whose mouth was full of phrases about peace, decided. In accordance with his choice and on account of the general war situation, these shipments could be made to the Western Powers only. And pretty soon this business grew into a real war aid, especially after the whole economic life of America had become militarized in favor of the Entente and the country dotted with munition factories, with English officers regulating the output. I shall not dwell any longer on a description of American "neutrality"; I have settled accounts with this question on other occasions.¹ The sharp distinction between Government and private shipments attempted in Articles 6 and 7 is illogical. It is equally detrimental to a belligerent whether war materials are being shipped to his enemy from Government or private munition plants of a neutral country. And as long as the neutral Governments make the commercial enterprises of their citizens in times of peace their own affairs, protecting them by means of intervention, then they ought to have in war times the same responsibilities as are assumed to-day by the ship of state.²

¹ See my essay, "Lusitania-Fall," 1915, p. 77, and my article, "England-Amerika und das Völkerrecht," in the separate issue of the Frankfurter Universitäts-Zeitung, p. 6 ff. But above all see also Heinrich Pohl, "Amerika's Waffenausfuhr und Neutralität," 1917, and Fleischmann (Zeitschrift für Völkerrecht, IX, 351 ff.). In one of his notes transmitted on August 16, 1915, the American ambassador at Vienna alludes to Elincke, p. 99. He would have done well to look up once more the note of the Union Government of 1872, which is quoted by Elincke on p. 91, and wherein America argues that while a neutral is not prevented, indeed, from engaging in an ordinary trade of arms, it is nevertheless contrary to international law for a belligerent to obtain all his war materials exclusively from a neutral State. See also Elincke in Berliner Zeitung am Mittag, No. 221 (August 30, 1915) and No. 222 (August 31, 1915).

² London declaration of laws and customs of maritime warfare, Article 61.

There exists, however, another contradiction.

While the convention defining the rights and duties of neutral States on maritime warfare permits, in Article 7, the exportation of war materials, it suddenly intones, in the next article, the high song of State neutrality. Accordingly, it considers it the duty of a neutral State to oppose in neutral waters the equipping and arming of vessels for war purposes and to prevent the departure of vessels that have been thus fitted out within the jurisdiction of its territorial sovereignty. Thus no infraction of the law of neutrality is committed if the wharves of neutral private contractors ship to a belligerent hundreds of vessels and the munition plants thousands of cannon or millions of firearms; but if only one ship sails armed with a few cannon, then this constitutes a breach of neutrality, because a neutral territory serves thereby as a basis for war operations.

Risum teneatis amici! (Restrain your merriment, friends!) The departure of a vessel fitted out for war service in a neutral territory can certainly not be treated as a matter of little consequence. This involves, indeed, a violation of neutrality, and the declaration of neutrality of the three northern States of December 23, 1912,¹ as well as the Dutch declaration of neutrality of August 27, 1914,² were right in prohibiting such a practice. But an infinitely greater injustice is done to a belligerent when his enemy is kept in a good fighting condition only through the fact that the entire industry of a great country is suspended so that he may be kept supplied with war materials, and munition plants are erected overnight, as if by magic, and the output shipped to him exclusively. Moreover, if the mere sale of ships to one belligerent, contrary to the prevailing view and usage,³ has become lately regarded as suspicious and not permissible,⁴ then it is perfectly clear how easy it becomes, even on the basis of existing laws, to arrive at a consistent point of view with all of its consequences.

Between Articles 7 and 8 there exists a sharp contrast, a gulf that can not be bridged over. One is tempted to say: Reason turns into nonsense, kindness becomes vexation. Article 8 is a repetition of No. I of the Washington Regulations⁵ that had been agreed upon for the settlement by arbitration of the Anglo-American Alabama controversy in 1871. The agreement applied to the Alabama case only;

¹ Article 4, § 3.

² Article 13.

³ Compare Willms, "Die Umwandlung von Kauffahrtschiffen in Kriegsschiffe," 1912 (Dissertation of the University of Würzburg), p. 127; Einicke, "Rechte und Pflichten der neutralen Mächte im Seekrieg" (Zorn und Stier-Somlo: Abhandlungen aus dem Staats-, Verwaltungs-, und Völkerrecht X), p. 185.

⁴ Thus the Dutch declaration of neutrality of 1914, Article 13, reads: "or to deliver or supply such vessels to a belligerent."

⁵ The Washington Regulations are reprinted in full in Fleischmann, "Völkerrechtsquellen," p. 96. Compare also v. Pauer, "Entstehungsgeschichte der Washingtoner Regeln," 1908 (Dissertation of the University of Würzburg).

but it had a more general importance that went beyond this case; it was only necessary to give it a firm basis. However, "law and custom are inherited like a generic disease." The Washington Regulations remained limited to the Alabama case, and the shortsightedness was so great that, for similar cases, directly contradictory regulations were enacted later on. This happened exactly in Article 7 of the Hague Conventions defining the rights and duties of neutral States in maritime war.

There was but one man who already in the Alabama controversy perceived clearly the close correlation in the complex of problems and who endeavored at the same time to find a solution, which is the only one that may be regarded as legally correct within the boundaries of the principle of contraband; this man was Bismarck. Upon the receipt of a dispatch from Count Beust, on March 10, 1872, Bismarck declared himself willing to accede to the Washington Regulations upon the condition only that the prohibition against the arming of vessels shall also include a proviso against the exportation of arms.

That which in 1871, in view of the particular case, did not seem advisable yet, but which should have been retrieved during the work on the Hague code, will have to be given special attention in all future work on reform and eventually enacted, unless it shall be found preferable to abolish the entire right of contraband. The fact that in the meantime the Governments have declared themselves in favor of the opposite method may, perhaps, render the final decision a more difficult matter, but it can not prevent it altogether. Indifference must be overcome with reason, selfishness through justice.

The special interests of the belligerents stood hitherto too much in the foreground. Their legislation alone determined what was to be regarded as contraband. The London Declaration contains, indeed, a list of articles that are to be ordinarily regarded as constituting contraband, that is to say, without any previous proclamation on the part of a warring faction (Article 22); but England insisted upon the right of supplementing the list, and such a proviso was thereupon inserted in Article 23.¹ And England demonstrated during the world war what she can accomplish by means of a supplementary list.

The interpretations to Article 23 make it clear that the danger involved in the contraband extensions, which merely continue the old

¹ All the States, with the exception of Spain and Holland, provided for an extension of the list of articles of absolute contraband in the very memorials that were submitted by them in preparation of the London Conference regarding the laws and customs in maritime war. (Schramm, "Das Prisenrecht," 1913, p. 225.)

system of giving arbitrary definitions to contraband,¹ were pretty well recognized during the discussions.² And the additional arguments contained in the official commentaries in no way tend to weaken these scruples.

For it is stated in these that, for the time being, it may, perhaps, prove difficult to specify such additional objects as are not already listed in Article 22; but that it is to be apprehended that new discoveries or inventions may render the list enumerated in Article 22 insufficient. A certain amount of justification may be seen in this; but infinitely more significant and of far more serious consequences are the effects of such a freedom enjoyed by the belligerents upon the neutral nations, who through the constant revisions of the lists find themselves in a state of intolerable uncertainty and nervousness and who eventually may find themselves totally disregarded. In these constant revisions the desire for tormenting usually has greater weight than the considerations of war necessity. This placing of the belligerents in a position of supremacy must be done away with under all circumstances; the neutral nations have a right to demand this much. Justice means an equalization of interests and should impart above all a feeling of security. The rules of international law require that, in order to render any partiality impossible, an exhaustive list must be created in advance which is to remain in force up to the time of a revision by agreement and which may be extended only with the consent of the neutral nations. If this were the case, commerce would be warned already in times of peace. If, however, in view of the fact that the enumerations hitherto made were incomplete and since the present constantly increasing development of the art of warfare makes a complete enumeration impossible, no desire is felt to adopt the so-called method of enumeration,³ then the Governments ought to confine themselves to an acceptance of the general tenor of both neutrality agreements (Article 7)⁴ whose interpretation is placed in the hands of the neutral nations, but to which the belligerents may

¹ Thus every belligerent through a one-sided proclamation determined the kind of materials he was going to treat as contraband in a given war. To be sure, the neutral nations had a right to complain and attempt to obtain alleviation through negotiations. But that was all. As early as 1877 the Institute of International Law (Institut de droit international), on a motion made by Moynier (Annuaire II, 110-118), voted to sustain the right of the belligerents "to determine in advance the nature of the goods" (déterminer d'avance les objets), and remained later on true to this principle. But even at that time Bulmerincq was opposed to it, while before that Rolin argued in his answer to Westlake that such a privilege would leave too much play-room to the arbitrary will of the belligerents. Beckenkamp makes now the same argument in his essay. "Die Kriegskonterbande" (Dissertation of the University of Würzburg, 1910), pp. 20, 23.

² "It has been regarded as going too far to grant to any Government the privilege of making additions to the list through mere proclamations." (German White Book, p. 33.)

³ Bulmerincq argued thus in the Institut de droit international. (See Beckenkamp, "Die Kriegskonterbande," p. 13.)

⁴ Thus, for example, the memorandum submitted by Japan in advance of the London Conference regarding the laws and customs of maritime war designated as articles of absolute contraband only "arms and munitions." (Schramm, "Das Prisenrecht," p. 225.)

take exception through diplomatic channels. Such a reversal of the right of complaint which ought to take place by all means, regardless of whether the contraband goods are enumerated or not, would be of the utmost importance to the neutral nations.

Woolsey expressed the opinion at the Institut de droit international, 1874-1875, that the war contraband ought to include, besides arms and munition, also their basic component elements, such as sulphur, nitre; but Bulmerincq warned against subjecting even the so-called indirect contraband to the right of confiscation. For eventually such an interpretation would include everything that might be useful in the manufacture of objects used in warfare and this would lead ad infinitum. For that reason the plan of contraband submitted by Kleen in 1893, which we shall take up presently, proposed in § 2 that, for the purpose of forestalling any attempts at evasion, only such articles should be included in the contraband list which, like single parts of arms, can become weapons of war by simply being put together.

In conclusion the following may be stated: It shall by no means become the duty of a neutral Government to supervise every small sale; it will suffice to merely prohibit the wholesale trade in weapons; and this can be curbed easily.

III. I do not stand alone with my suggestion for an international law against the exportation of arms as constituting absolute contraband which I made already in my essay "*Lusitania-Fall*," p. 93 ff.¹

The Institut de droit international, too, took up this question immediately after its establishment in 1873.² We shall now go into a fuller discussion of its transactions in this matter.

Woolsey, Vidari, and Bulmerincq regarded a reform in the direction of a general prohibition of exportation as desirable. But Rolin, Westlake, and Lorimer, the last of whom even advocated absolute abolition of the idea of contraband, expressed the fear that such an abolition might merely contribute to a multiplication of pretexts and prospects for future wars.³ Now, this apprehension is no longer justified in the case of my proposition which, as we shall soon perceive, demands as a recompensation complete freedom for the so-called conditional contraband.

At the meeting of the Institute at Geneva in 1892, on a motion by Kleen (Sweden), the question of contraband was made the order of the day as a special subject for discussion, and the proponent was charged with the task of submitting a report.⁴

¹ See Cussy, "*Phases et causes célèbres du droit maritime*" (Famous Aspects and Motives of Maritime Law), II, 407, and the references quoted in my "*Lusitania-Fall*," p. 94.

² See Beckenkamp, "*Die Konterbande*," p. 6 ff., and particularly 16 ff.

³ *Op. cit.*, p. 17.

⁴ *Annuaire* XII, 283.

Kleen's plan of 1893,¹ as expressed in § 5, is explicitly founded upon an international law against the exportation of arms. According to this epoch-making and very extensive plan the law of nations is to make it the duty of a neutral State to supervise its subjects, so that they do not export contraband goods. Kleen at the same time includes only actual war materials as such. The neutral government is obliged to prohibit by law, to prevent, and to punish the shipment of contraband goods.

Kleen knew well that he was advocating an enormous innovation. And, as a matter of fact, his plan was attacked most violently at the Institute with arguments, some of which were of a highly singular nature; however, thus Kleen argued, we are living in a transition period of development; and he defended boldly the principle that the shipment of contraband must not be regarded as a mere business risk, as a business adventure, the responsibility for which may be left by the State to the shipper, but that it must be treated as a breach of neutrality which ought to be prohibited and prosecuted. Opinions became divided on this point. Several delegates raised the objection that such an obligation of neutrality might easily lead to complications; Kleen answered this objection with the following arguments:

One can not demand the impossible of a neutral Government; war will not be declared because of the unpunished sale of a bullet or two; the neutral State will be merely required to do its best according to its belief and conscience.

It is true that § 5 was rejected while still under discussion by the commission, and eventually the whole plan was replaced by another one,² more in accord with prevailing opinion. But even the plan suggested by Perels (see § 11) intended to make it obligatory upon the neutral Governments to prevent the shipment of arms to the bel-

¹Annuaire XIII, 1 ff. This plan appeared also in book form under the title, R. Kleen, "Contraband of war and shipments that are forbidden to neutrals according to the principle of international law" (*De la contrebande de guerre et des transports interdits aux neutres d'après les principes du droit international*, par R. Kleen, Paris, Pedone-Lauriel, 1893). Concerning this plan, see Beckenkamp, p. 34 ff.

²Shortly afterwards the Commission, by remodeling Kleen's plan, agreed to a rough draft (*avant-projet*, Annuaire XIV, 33-43), which was laid before the general meeting at Paris in 1894. But Perels presented at this meeting a counter sketch consisting of only 11 articles and accompanied by justifying argument (Annuaire XIV, 58-64), which was taken up during the sessions held at Cambridge in 1895 (Annuaire XIV, 93 ff.). Thereupon Kleen and Brusa, following the resolutions adopted at the meetings in Paris and Cambridge, worked out a third or compromise sketch which contained again only 11 articles and was accompanied by extensive explanatory notes (Annuaire XV, 98-124). Finally, on the basis of this sketch which made it necessary to introduce certain changes in the prize regulations that were decided upon at the Turin meeting in 1882, an "international regulation of contraband" (*règlement international de contrebande*) was passed at the sessions held in Venice in 1896 (with 13 votes against one, while five refrained from voting). See Annuaire XV, 189-233. But although this sketch was drawn up largely in accordance with England's wishes, Lord Reay (chairman of the meeting) nevertheless voted against it. Those refraining from voting, which was equivalent to a negative vote, were: Westlake, Brocher de la Flechère, Engelhardt, and the two German delegates, Perels and Harburger.

ligerents. While the (third) compromise sketch was silent on this question, justifying it with the statement that it is doubtful, indeed, whether it would be expedient or even necessary and not too much expected, to demand of the neutral States that they suppress the trade in contraband goods; nevertheless the proponents added the statement that they regard it highly desirable and are even convinced that in view of the fact that thus far "only seven members¹ have declared themselves openly against it," the majority of the Institute is in favor of the repression of the neutral export of arms.

Unfortunately the project fell through, chiefly owing to the fact that the members of the Institute were not quite ready to see an unneutral act in the shipment of contraband. But if the problem is once regarded in the proper light and judged correctly, then logical consequence will lead irresistibly to the necessity for repressive measures on the part of the neutral Governments.

IV. The spirit of true impartiality can assert itself freely only through an international embargo against the exportation of articles that constitute absolute contraband. To be sure, Article 9 of the Convention concerning the rights and duties of neutral States and individuals in land warfare demands that the neutral Governments must apply to an equal degree their restrictions and prohibitions in the matter of contraband to both belligerent parties, but the decision of a neutral State may nevertheless have a most unequal effect, and this inequality may be intended at the very time of making the decision. In such cases we deal with the so-called benevolent neutrality, a *contradictio in adjecto*, and thus far it has been practically impossible to overcome it. Moreover, under the existing laws of nations, the Governments are by no means obliged to exercise supervisory duties in the matter of contraband. Companies and private individuals may make wholly one-sided shipments under the very eyes of a Government and are thus in the best position of exercising an undue influence upon the course of a war. But even disregarding this fact, the exportation of arms is bound to prove more or less advantageous to only one faction, in accordance with its geographic position and shipping conditions, and can not but have an unequal effect. And lastly a general international law aimed against the exportation of articles constituting absolute contraband would also serve the interests of mankind in general. Wars would no longer be prolonged because of cooperation on the part of neutral Governments. The question of business would become a question of humanity.

This new order of things would also have the additional good effect that the belligerent, who feels himself injured, would be no longer

¹A majority of these members were Englishmen.

compelled to take recourse to measures of self-help. The chase after contraband would be unnecessary, the sea would become free. If the difficulties of supervision have been hitherto overestimated, then the world war has taught us a different lesson. Under the new system, supervision would become child's play in comparison with the internal control which England demanded in this war of the neutral nations.

Besides, all difficulties would be removed at one stroke. It is only necessary, as has been proposed before by various individuals, to nationalize the war industries and, according to the arguments presented on page 80 f., the export becomes interdicted on the strength of existing laws.¹

In conclusion, I wish to say one word more concerning enemy aid. The London Declaration of the laws and customs of maritime war regards every shipment of contraband as constituting an act of hostile assistance. But, according to the official "elucidations," Articles 45-47 deal with special cases which were considered, for that reason, as requiring special regulations. Two classes are distinguished here: minor cases (Article 45), and cases of a more serious nature (Article 46). In the first instance, the guilty vessel is treated according to the laws of contraband, while in the second case it is treated as an enemy ship. But it may be possible, perhaps, to charge the State in individual cases with the supervision, while in other cases, without making a distinction between neutral and enemy ships, the vessel may be given the designation of an auxiliary war ship, in which case the English proposal made at the Second Hague Peace Conference may be called into play.² It is not necessary to go here into the further details.

§ 11. CONDITIONAL CONTRABAND.

My plan demands, furthermore, that the idea of conditional contraband disappear entirely from international law. While according to my proposal, all articles needed in warfare, hence the objects which hitherto constituted absolute contraband, can no longer be transported nor shipped in transit, and while the sovereign who fails in his supervisory duties renders himself liable to a breach of neutrality, for which he may be brought to account through diplomatic channels, commerce is to remain absolutely unrestricted in all other respects. It is easily perceived that the stakes involved in the control of war shipments are not too high; the sea becomes really free.

And if the existing right of contraband constituted for centuries one of the most debated phases of prize,³ then this applies par-

¹ Wehberg, "Seekriegsrecht," p. 122: "This might, perhaps, prove satisfactory."

² See above, p. 70 f.

³ Schramm, "Das Prisenrecht," 1913, p. 204; Beckenkamp, "Die Kriegskonterbande," p. 1 ff.

ticularly to the conditional contraband with its confusing rules that can not be carried into effect easily and with its sphere of validity extended into the infinite on account of the system of auxiliary lists. In addition to this, its legal justification is rotten to the very core.

By conditional contraband are meant articles and materials that may be "employed for war as well as peaceful purposes,"¹ and, above all, foodstuffs which, for that very reason, were mentioned by the London Declaration of the laws and customs in maritime war in the first place.

In the case of conditional contraband we deal with articles of trade that are equally needed by the armed forces as well as by the peaceful population. The uncertainty concerning their ultimate use constitutes their characteristic trait.

For that very reason when, after the first session at Geneva (1874), the problem of contraband came up for discussion at the preparatory meeting of the Institute of International Law (*Institut de droit international*), three members immediately declared themselves strongly opposed to the conditional contraband, while the Englishman Westlake defended its retention.

Kleen's plan, too, which was fully discussed in the preceding pages, is in agreement with my own views. He wants to prohibit only the shipment of "actual war munitions" (*munitions de guerre proprement dites*) as constituting the chief articles of military aid. Kleen was of the opinion that it was not advisable to stamp as contraband and to prohibit by means of a contraband law the sale of such articles as were required too much in the course of daily life. According to §9 of his proposal, the powers were to come to an agreement concerning a general international convention that would cover only objects of so-called absolute contraband and likewise any changes in the contraband list that might eventually be required on account of inventions, progress in the art of warfare, or new international principles. For that reason, Kleen, whose far-seeing mind already perceived, as it were, the Hague Peace Conferences, had in view alternating revisions of the lists at periodically convoked conferences. He expressed himself strongly against contraband declarations being issued by the belligerents; these, in his opinion, were never determined by considerations of the general but invariably of selfish interests.

Kleen's proposal did away entirely with the concept of conditional contraband and, in contradistinction to the Cambridge Resolutions, his (third) compromise plan, which defined, moreover, munitions of war more clearly as "war materials" (*articles de guerre*).² His motion was adopted by a vote of ten against five members, took in

¹ Declaration of London, Article 24.

²At the general meeting Desjardin moved to replace the descriptive conceptional definition with the method of enumeration.

section 4 the point of view that peaceful commerce is bound to suffer mainly from the retention of conditional contraband, because in modern times wars break out more suddenly and the commercial relations are much more extensive than in former days; it was stated, furthermore, that an intolerable injustice would be done to the neutral nations if no exceptions were granted at least to such of their transports as were caught on the high sea at the outbreak of the war.

This question caused a heated discussion at the Venice meeting in 1896,¹ and the decision finally arrived at was in favor of a middle course, which had already been taken by Grotius,² and which was also advocated in several of the newer scientific books, after the example set by the English writers.³ This new plan retained conditional contraband, but made it no longer subject to confiscation; instead the conference satisfied itself with the right of detention and eventually that of preemption in lieu of an additional compensation of ten per cent. In this way a measure still conceivable from the military point of view was replaced by a direct attack upon the right of sovereignty. Brusa, acting as reporter in place of Kleen, who was absent, was so displeased with this result that after an unsuccessful protest he even wanted to discontinue the report, but continued it only upon the express wish of the presiding officer.

On p. 73 Beckenkamp observes:

The Venice Resolutions can not be regarded as a declaration of a general legal conviction, they do not even give expression to the so-called prevailing doctrine; but few authors defend in their writings the right of preemption and, moreover, the later writers are more often of the opposite view (v. Liszt, v. Martitz). Furthermore, in its practical application the doctrine has by no means followed the road pointed out by the Institute in 1896; in this respect I have only to refer to the extensive declarations of contraband made by both parties during the Russo-Japanese war.

¹ A brief report of the transactions is given by Beckenkamp on p. 68 f.

² "The Laws of War and Peace" (*De iure belli ac pacis*), III, c. 1, § 5. What we call to-day conditional contraband (and this is the phrase used in Article 24 of the London Declaration) and also accidental (occasional) or potential contraband, respectively, was designated by Grotius as "articles having a double use" (*res ancipitis usus*). Such articles are involved here which ordinarily satisfy the needs of the peaceful population, but which may be also utilized for war purposes and whose potential utilization for such purposes must be always taken into consideration. Their eventual destiny is determined by the war situation (*status belli*); that is to say, in adaptation to given circumstances. A belligerent may appropriate such articles for his own use only in cases of dire necessity, and even then he is required to indemnify the owner.

³ For that reason Westlake emphasized during the discussions that the idea of a right of preemption is in perfect agreement with the practice hitherto followed by the English admiralty. To be sure, during the present world war the admiralty applied this theory only for the purpose of intensifying the English plan of starvation, in accordance with a provision of the order in council of March 11, 1915, subjecting to the rights of confiscation and preemption all articles shipped to or from Germany which slip through the tight meshwork of the right of contraband.

The invalidation of the right of confiscation into a mere right of attachment and preemption reveals a guilty conscience. We see in it the valuable admission that articles which are also required by the peaceful population can not be placed upon an equal footing with war materials. But the promulgation of a right of seizure and preemption is really of no advantage to the civilian population, it merely diminishes the losses of the shipper while exposing at the same time every phase of commerce to new complications.

For that reason, the London Declaration of the laws and customs in maritime war took a different point of view. Bynkershoek already opposed strongly the principle of a purely potential contraband set up by Grotius and propounded the view that only such articles ought to be regarded as contraband as are intended for use in war operations or are actually delivered for the utilization by an enemy military force, and he maintained, furthermore, that such articles must be accorded the same treatment as the exclusive war materials.

From a conceptional point of view the London Declaration of the laws and customs in maritime war adhered to this doctrine, but resisted its right, logical consequence, otherwise it would not have adopted the twofold division of contraband.

The London Declaration makes it perfectly clear, in the first place, that, in contraband of whatever sort, the quality and destination of the object are equally essential; and thus an article, which at first constitutes only potential contraband on account of its quality, in so far as it can be also utilized by the military forces, becomes an object of absolute contraband only upon the demonstration of its military destination. The principle is clear; it is the view expressed by Bynkershoek. But now there arises a difficulty: How is this destination for military purposes to be recognized in objects of conditional contraband? In the case of absolute contraband this is a simple matter. The Declaration states: According to the terms of Article 30, in the case of objects constituting absolute contraband, it is sufficient if the captor proves that the cargo is on its way to the enemy territory or enemy fleet. Under these circumstances no difficulties can arise, particularly in view of the regulation contained in Article 31 and intended to facilitate the demonstration of the final proof. Everyone knows the eventual use for which a shipment of cannon is intended and which is on its way to the country of a belligerent.

But in the case of objects of conditional contraband complete proof is necessary. Whoever brings up the prize—that is to say, the captor—must prove, in accordance with Article 33, that the shipment is not meant to be of benefit to the civilian population, but is “intended for the use of the fighting force or of the administrative depots of the enemy Government.” But how are such proofs to be produced

if the consignment is not made out directly to some official administrative point? One is compelled to resort to conjectures, in accordance with Article 34, and these have to do partly with the identity of the receiver and partly with the nature of the point of destination. In the first case the mere consignment to an enemy authority or to its agent is sufficient. In the latter instance it suffices to prove that the shipment goes to a fortified point or to a place serving as an auxiliary base for provisioning which is intended to become a source of power to a fighting force on account of the war materials that are being piled up there. But England, to whom on second thought these conjectures did not seem formulated clearly enough, and which desired a plainer wording as a protection against the starving out of the English population, thereby proving that she perceived clearly the real significance of Article 34, by her openly admitted dastardly attempt to starve out Germany, has shown during the present world war how the legal conjectures in the matter of a precise wording and meaning may be extended, until eventually all guarantees for the sustenance of the people are nullified. Furthermore, the order in council of August 20, 1914, § 5, deprived contraband of all the protection given to it by Article 35 of the London Declaration by rejecting the theory of a continuous voyage. As early as November 16, 1914, the English Prime Minister stated in the House of Commons that it was England's principal task to prevent the shipment of foodstuffs via neutral ports that are intended for the German people. Thus the distinction between absolute and conditional contraband was actually wiped out, and in the English contraband list of April 13, 1916, this differentiation is made no longer, with the justification that "for practical purposes" such a distinction has gradually lost all value. The constant amplifications of the contraband list eventually had the effect of practically abolishing the free list, and even in the case of goods of a noncontraband character all imports and exports to and from Germany became subjected to English confiscation ever since March 11, 1915, the day on which the order in council was issued.

The idea of conditional contraband is that, in the case of objects which are also needed for the use of the civilian population, confiscation is permissible only when it can be proven that this contraband is intended for the fighting forces. But England substitutes a mere potentiality for the reality in the sense in which it was meant by Grotius, at the same time reacting, in contradistinction to the latter, with measures which he considered permissible only from the point of view of reality. England renounced the new regulation of the law of contraband, although it was enacted with her cooperation and under her leadership, and threw out the gauntlet to the lofty

spirit of humanity which had given form and content to this new regulation. And then England drowned her guilty conscience with disgusting cries of German barbarity, and in these she was obligingly joined by a simple-minded world.

Besides, attention may be called to the following facts: A commission was created in England in 1903 and charged with the duty of "investigating the conditions of importing foodstuffs and raw materials in times of war." The results of the deliberations, lasting two years, were laid down in a Blue Book,¹ wherein England's economic dependence upon foreign countries was strongly emphasized and which demanded, among other things also, the safeguarding by means of an international law of the imports in times of war. Accordingly, Foreign Secretary Grey instructed Sir Edward Fry, the chief plenipotentiary to the Second Hague Peace Conference, that it was to England's best interests that each effective measure tending to protect the importation of foodstuffs and of raw materials for the peaceful industries should obtain all the sanction that could possibly be given to it by international law.²

In this spirit then the English delegates to the London Conference worked for the realization of Article 34 containing the conjectures as to the inoffensiveness of the destination and insuring the importation of materials needed by the peaceful population. How perfectly well England understood the spirit of the law of contraband is shown by her subsequent attempts to find a still clearer wording for this guarantee.

Let us now compare to this the English attitude in the world war on one hand and, on the other hand, the hypocritical slogan of subordination of might to right.

To be sure, in the beginning England acted towards America as if she still adhered to the principles proclaimed in the London Declaration (Articles 33, 34). Thus the note addressed on February 10, 1915, to the North American Union stated that, as long as the German Government assumes control of all the foodstuffs and of nearly all goods that come under the definition of conditional contraband, it is clear that such shipments to Germany are consigned to government points of administration.

As a matter of fact, in accordance with a proclamation of the Federal Council of January 25, 1915, § 45, II (RGBl, p. 44), even the grain and flour imported from foreign countries had to be delivered to collecting agencies and companies, but the very next proclamation of the Federal Council, issued on February 6, 1915, Article 1, § 5 (RGBl, p. 65), recalled the first order. Did not England place in

¹ "Report of the Royal Commission on supply of food and raw materials in time of war," 3 volumes, 1905.

² "Correspondence respecting the Second Peace Conference," p. 17.

the beginning obstacles in the way of feeding the Belgian population through accusations, until this question was finally solved satisfactorily through the intervention of the neutral states?¹ But the question of feeding the German population remained unsolved; and since the neutrals failed in this, our submarines took over the solution, but were unfortunately compelled to make the neutrals feel that it was to their disadvantage to have yielded to England's dictation on the sea.

I am not going to waste another word on the unheard of illegality of the English plan of starvation which was followed by the unrestricted submarine warfare as a measure of retaliation; history shall render her impartial judgment in this matter.

I merely wish to bring here to light the position of the English plan of starvation within the confines of international law.

English contraband policy affected the neutral over-sea trade to its very foundations. Freedom of the seas exists no longer.

Long before the world war the following appropriate description of the English contraband policy was given by the French professor of international law, Bonfils, in his *Manual of International Law*:

England does not desire nor ever wanted fixed and precise, clear, and unequivocal legal precepts that would be binding upon all civilized Governments. . . . She decreases or increases her prohibitory measures according to her position as a neutral power or as a belligerent. As a belligerent she prohibits as many things as possible, especially such as are particularly useful in warfare to the enemy. She prohibits the shipment of articles of a most innocent nature and also of such as are indispensable to life, as, for example, grain, foodstuffs, etc. As a neutral power England declares free as many things as possible, and particularly the products of her own industries, especially when fat contracts may be expected from one belligerent.²

The American note to Germany of July 23, 1915, states: "The rights of the neutral States in times of war are based upon principles, not upon expediency, and principles are unchangeable." This proclamation should have been addressed more properly to England, for it was against her that the German as well as neutral notes have repeatedly proven an illegal paralyzation of the legitimate neutral trade.

Thus far the right of contraband has been an undisguised expression of might. Inasmuch as England, during the present war, has repeatedly assured the whole world that in international intercourse might must be replaced by right, one might have expected that the subordination of might to right would no longer meet with any oppo-

¹ See my essay, "Die völkerrechtliche Stellung der vom Feind besetzten Gebiete," 1915, p. 41 ff.

² Bonfils-Grah (1904), p. 776.

sition on the part of the English Cabinet even in the case of the law of contraband. But this remains to be seen.

If during the peace negotiations the cry is uttered: "Back to international law," then the following principles must be insisted upon concerning conditional contraband. The conception of a merely potential contraband is theoretically and practically untenable, and the definiteness necessary to actual contraband exists only in the imagination. A safeguard against future slips and the unleashing of a war of nations, and against a destruction that bids defiance to civilization, as well as a safeguard for the maintenance of the neutral over-sea trade in war time exists only in a limitation of the right of contraband to war materials; that is to say, to articles of absolute contraband. This must remain a minimum demand. By excluding the theory of a continuous voyage from the principle of conditional contraband, the London Déclaration recognized that through the insertion of the theory of "things having a twofold use" (*res ancipitis usus*) into the law of contraband the bow has been bent too much. The nature of war, which is a combat between States and not between peoples, as well as the interests of the neutral sea trade, which may be restricted, even in war times, only to a tolerable degree, demand that conditional contraband be completely stricken from the right of contraband. A more acceptable adjustment lies in a firmer check placed upon the neutrals in the matter of absolute contraband.

By means of such a reform of the right of contraband the freedom of the seas in times of war would be established more firmly than could be done by any other measure. The whole problem is of such an importance that even in the new declaration of the maritime laws that is to be agreed upon at the conclusion of peace some such principle ought to be accepted. And if the absolute abolition of the right of contraband is rejected as being premature, then at least the following minimum demand ought to be made:

The concept of conditional contraband hereby is and remains abolished. Henceforth there exists only an absolute contraband whose extent shall be determined exclusively by means of a general agreement, and it shall be the duty of the neutral powers to prevent its shipment from any territory that is subject to their sovereignty.

Even the attempts at localizing the effects of the right of contraband¹ can satisfy no longer. Neither the belligerents nor the neutral States gain by a prize that is restricted to certain well-defined zones, and the freedom of the seas is not safeguarded sufficiently.

¹ The following writers represent this point of view: Schmalz (*Das europäische Völkerrecht*, 1817, p. 288), Bluntschli (p. 474), Hold von Ferneck (*Kriegskonterbande*, p. 136), Wehberg (*Seekriegsrecht in Handbuch* by Stier-Somlo, p. 123). Opposed to it is Schramm, "*Prisenrecht*," p. 208.

England has failed to read the signs of the times. Instead of accusing Germany of feudalism and violence, she should have left inviolate the freedom of the sea hitherto so infinitely insignificant, and she should have contributed her share to the realization of justice throughout the world. In the meanwhile a higher price is being asked, and the solution of the problem must go deeper. England is being thrown back upon the program of the former lord chancellor, Earl Loreburn. England's boasted enthusiasm for liberty and justice will find here a splendid field for activity.

CONCLUSION.

My program stands unfolded. It endeavors to bring to a successful conclusion the work of liberation begun by Hugo Grotius. I am attempting a solution of the problem of the freedom of the sea within the frames of a liberal international policy. I demand a freedom of the sea based upon a free development for the States and mankind.

The freedom of the sea grants to each State the right to use the sea, and this use finds its restriction only in the equal right enjoyed by all other States. The view that in war the open sea is nothing else but a war arena and the peaceful rights to utilization are dislodged or placed at the mercy of the belligerents, must be done away with. The belligerent States may keep by all means their share in the use of the sea; the naval forces may remain in a position to try their strength on the water, just as is done by the armies on land. But in all other respects the sea is to remain free to the peaceful intercourse not only of the belligerent but particularly of the neutral States. Above all an end must be made to the practice whereby the neutrals are compelled to bear the costs of warfare. They may no longer be excluded by the belligerents from the sea and made subservient to the selfish interests of either party.

And if Germany appears once with such a program before the council of nations, then let our present enemies follow up the bloody passage of arms with a spiritual war against the "barbarians." For, then we shall learn at last what they think in reality of justice, civilization, and liberty. "Enough words have been spoken back and forth; let us now come to deeds!" The freedom of the sea is to-day the fateful question in international law.

To be sure, strong opposition remains yet to be overcome, and this not only on the part of England. But the world war has been a teacher of a very special sort. The terrible commercial warfare speaks in eloquent words. Eltzbacher's attempt¹ to perpetuate English barbarism as "international law that is binding" is a "literary war atrocity" in itself.² The tremendous events of the world war have brought international law to a turning point. Only

¹Eltzbacher, "Totes und lebendes Völkerrecht." 1916.

²Liepmann in the *Deutsche Juristenzeitung*, 1917, Nos. 21-22, Sp. 922. See also my criticism of Eltzbacher's essay in "*Weltwirtschaftliches Archiv*," 1917, pp. 406-412. Eltzbacher's essay was rejected curtly everywhere.

a powerful jerk upwards will be able to save it from a plunge into the precipice.

Supreme confidence had been placed in international law. But the war of nations reduced everything to the principle of might and, by summoning the entire national strength, by utilizing the wonderful powers of nature and technique, and above all, by abandoning all principles of justice, it developed into such a display of might as the world had never seen before. The latest justification for this illegal over-exertion of might is the endeavor to shorten the war and to bring about a final decision; in other words, to overcome the war by war. This method has proven a failure. In the last analysis we must rely upon an agreement by understanding. The result will be that the principle of right will achieve importance once more, and the teacher of international law will assume again his duties as a priest of Themis. The principle of right must now become the principle of might, and it must assert itself irresistibly and in the same degree as was the case with might.

The plan of a covenanted establishment of the freedom of the sea is, indeed, being accorded repeatedly a contemptuous and ironical treatment.¹

It is maintained: The freedom of the seas can not be obtained with England's cooperation but only against her will;² that is to say, with England simultaneously acting honestly and treacherously. I readily admit that a real and lasting liberation of the seas is possible only after the defeat of English sea despotism and of English prestige.³ We need not necessarily have in mind the crushing or humiliation of England, such as has been designed against us by the English Government from the very beginning, all supplementary denials to the contrary; but England's will to victory must be broken by force of arms and her Government compelled to recognize in place of English sea hegemony the equal rights of all nations.

The greater part of this work has been done already and—as far as it is humanly possible to judge—it will not be subjected again to an elaboration backwards.

The English mastery of the sea, in so far as it is directed against Germany, has already been broken in the main. All English attempts at denials can no longer change this fact. For, the mastery of the sea reveals itself negatively in the exclusion of others from its use and positively in the unrestricted use by oneself. In the first case England's power remains by all means an undisputed fact; German

¹ See especially Neumann-Frohnau, "Die Freiheit der Meere," p. 24 ff.

² Müller-Meiningen, "Der Weltkrieg," II, 134, etc.

³ Levy, "Die englische Gefahr für die weltwirtschaftliche Zukunft des Deutschen Reiches," 1916, p. 25; Siemens, "Die Freiheit der Meere," p. 55; Tielep, "Die Freiheit der Meere," p. 40 ff.; Neumann-Frohnau, "Die Freiheit der Meere," p. 21 ff.; Laband in the Deutsche Juristenzeitung, 1916, Sp. 1 ff., etc.

merchant vessels are still unable to navigate the seas. But in regards to English navigation and navigation for English interests, the language spoken by our submarine warfare and by the admitted shortage of tonnage is as clear as could be desired.

England has ceased to be the mistress of the sea.

And the English Government will begin negotiations as soon as it is ready to look dispassionately into the eyes of this naked fact and to abandon all hopes of ever regaining the mastery of the sea. Of course, one swallow does not yet make summer. But just the same, the appearance of the first swallow is usually hailed with great joy. And I see this swallow in the famous letter of Lord Lansdowne¹ who belongs to an historically renowned ruling family of England. Kjellen, of Sweden, wrote in the issue of the "Nya Dagligt Allehanda," of December 2, 1917:

Two souls are still fighting in England's breast. One is that of the bulldog, stubbornly reluctant to let go of its bite, the other belongs to the cold, calculating business man who recognizes that he can not win the war and, for that reason, liquidates it, before business goes from bad to worse. England can no longer achieve mastery over the world, hence the business man deems it advisable to share it with Germany and others. Otherwise, even this prospect will disappear with a mathematical certainty.

An editorial in the *Frankfurter Zeitung* of December 24, 1917, No. 355 (Evening edition), remarks rightly: "Whether history will regard such a termination of the war as a victory or compromise, depends entirely upon the degree of willingness displayed by our reluctant opponents." The Entente Powers feel that, in view of their avowed war aims, peace by agreement would, indeed, signify a defeat. Hence the cry: Stand firm until victory is achieved! Hold out until Germany is overpowered!² We are convinced, however, that after a few more defeats, England will be ready to begin negotiations.

Germany will have achieved her war aims if her possessions and boundaries are once more made secure, if the opportunity for ex-

¹ Appeared in the "Daily Telegraph" of November 29, 1917.

² According to the Times, the English Minister, Bonar Law, discussing in the House of Commons, in December, 1917, Lord Lansdowne's letter, uttered the following words: "A peace concluded on the basis proposed by Lord Lansdowne would actually mean a defeat for us. And what would be the position of the British Empire after such a defeat? We can no longer disguise the fact that a war which lasted so long and caused so much suffering, is bound to influence the population of every country, here at home as well as in the dominions. Now, should we in the end be unable to achieve our aims, does anyone really believe that the British Empire will be able to maintain its unity which, we hoped, might become stronger on account of the war? I, for one, do not believe it." The Anglophile, John F. Bass, writes in the same vein in the "Chicago Daily News" of October 17, 1917: "One side must win this war. For, a return to the status quo without indemnifications will mean a German victory. In that case England is bound to lose her dominating influence in Europe, since it would become apparent that her power is not as great as was generally believed."

tensive colonial activity is given back to her, and if she finds everywhere an open over-sea route to the markets of the nations.

If the war had brought about no changes in the balance of power or if England were still in truth the mistress of the sea, then negotiations concerning the freedom of the sea would be, indeed, the most superfluous things in the world. Either England could not be won over to agreements such as the world really needs or else she would invalidate them through restrictions and most certainly fail to respect them.

Kant pronounced once an annihilating judgment upon England. The following note, written on a loose leaf, was found among his effects and translated for the first time by Reicke in the "*Altpreussische Monatsschrift*":

The English nation (*gens*), as a people (*populus*), is the most valuable unit when considered in relation to mankind as a whole, but when considered merely as a State in its relation to all other States it is found to be the most destructive, the most violent, the most tyrannical, and war inciting among all.

The general distrust in England is based, in the first place, upon her demonstrated inability to keep agreements. England's *bona fide* credit, never any too good, has been nearly exhausted on account of the war. Triepel is right in declaring: "In this respect the experiences of the present war have turned even the most trustful nations into skeptics."¹

In his poem, "*Die Philosophen*" (*The Philosophers*), Schiller puts the following words into the mouth of the "Third"—that is to say, of the English nature philosopher Berkeley—who denied the existence of the material world:

There is no other thing but I;
Everything else dissolves in me into a bubble.

This was also England's attitude up to date in all of her international dealings.

Bismarck, who knew England very well, says:

The respect of the rights of other nations goes in England only so far as this does not interfere with English interests.²

To be sure, Loreburn asserts:

There exists a school in the foreign countries which believes our Government capable of Macchiavellian politics, and maintains that since the days of Lord Stowell we had piled up a sackful of legal subtleties and precedence cases, by means of which we would be able to regain everything that we were apparently willing to renounce. An injustice is being done us. We are neither as crafty nor as unscrupulous as our enemies think.³

¹ "*Die Freiheit der Meere*," p. 14. See also van Calker, p. 23.

² "*Erinnerungen*," II, 267.

³ Loreburn-Niemeyer, "*Privatgut im Seekrieg*," 1914, p. 152.

But if Loreburn chooses to measure England's present warfare by the rules of the law of maritime warfare which he himself sketched so clearly, then he will no longer wonder at the harsh judgment, which, as a matter of fact, is not confined to a single "school," but is rather universal.

And yet the English prime minister, Lloyd George, speaking in the English House of Commons in December, 1917, by a complete transposition of circumstances dares to enter once more the English deficit against the German credit and to make the following prediction:

I must say that a country which believes Germany capable of fulfilling a promise according to the letter and spirit simply does not know this power, and he is bound to have unpleasant experiences.

We are looking forward calmly to these "experiences." We are not sure whether the English indignation is sincere. We are, however, certain of the fact that an agreement with England will cost us the greatest sacrifices.

But no matter how much justified we may be in our indignation at the "perfidious Albion," there remains nothing else but that after the war the opponents of to-day must once more sit down at the same table and conclude agreements.¹ And then the question will arise whether we will be in a mood to cooperate. But history will repeat itself, and the same thing will happen as has happened after each war and as is related in the "Song of Walthari" (Das Waltharilied). After Gunther lay on his shield with a crushed leg, after Walthari had lost his trusty right hand, and the fierce Hagen one eye and six grinders, then the heroes withdrew haughtily from the battle. And even if the modern negotiators of peace do not outbid one another, midst jokings, in eulogies, as was done by the three heroes of the story, still it will be said in this case, too: They renewed the old oath of fidelity.

We must approach the new order of things with confidence. Distrust is a bad adviser. Distrust has rendered splendid services in the origin of the war; and it is the lack of confidence that stands in the path of concluding the war.

But, of course, caution is just as much advisable.² Germany must curtly reject as valueless any agreements which England may bungle through counter moves, or render void through essential restrictions, or fail to ratify at all. Better no agreements whatsoever than a bad agreement or one from which England may slip out. Upon England

¹ Thus likewise v. Liszt, *Deutsche Juristenzeitung*, 1916, Sp. 21; Nöldeke, *op. cit.*, 1915, Sp. 973 ff.

² Laband, too, advises "extreme caution" (*Deutsche Juristenzeitung*, September 1, 1916).

will then fall the responsibility for the lawless international conditions and especially for the failure to accomplish the limitation of armaments so much desired by the whole world. Even now the warning is being sounded in Germany:

Let there be no new obligations by means of international agreements in the matter of the laws and customs in maritime war. * * * If it becomes at all necessary to subject our attitude toward enemy and neutral powers during war to definite legal regulations, then let these regulations assume the form of Imperial Laws. The laws of the German Empire shall henceforth constitute the basis of our war practices.¹

But why the need of a law at all, and thereby of a legal obligation assumed by the supreme commanders and naval forces, if the opponent enjoys the same absolute freedom as we do? Would it not be better in this case to simply place the decision into the hands of the supreme military authorities, knowing that they would make their decisions dependent upon the general war situation? Why not adopt, then, the slogan: No agreement, but freedom of action!

Stier-Somlo says of van Calker's proposal: "It is highly probable that this will be the final solution. However, it will have to be perfectly understood that from the point of view of international law it will mean the death of maritime warfare."² But it does not seem advisable to cause this death, or, rather, hasten it, as long as an improvement is still possible. It is only necessary to perceive clearly what it would mean: Every belligerent establishes his own rules and regulations. The world war has shown with a horrifying clearness where such a state of affairs would lead to.

In the discussion of a new international order of things the problem of sanction will surely not be the least important. We shall wait and see what forces will be mobilized against a breach of international law and how the international community intends to proceed against a violator. I do not think much³ of the plan for an international maritime police force. The economic boycott, rather, will have to be resorted to, which, while constituting a breach of international law when directed against peaceful and right-minded States, can nevertheless become an effective coercive weapon in the hands of international law when wielded against the violator as an ordinary, legally developed measure of retaliation.*

And in case the neutral community of nations fails to achieve its ends, there will still remain to us our present remedy, the right of

¹ Van Calker, p. 27.

² "Die Freiheit der Meere," p. 97.

³ See also Triepel, p. 14. Somewhat sharply Neumann-Frohnau, "Die Freiheit der Meere," Foreword.

* Concerning the question of consummation see also Stier-Somlo, p. 131 ff.

self-preservation. Should England at the outbreak of a fresh Anglo-German war, again attempt to stand international law on its head without being immediately called to order by the international legal community, then the wrath of retribution will once more overwhelm the violator. Thus our position can by no means grow worse because of an agreement; it may merely fail to improve at the worst.

Besides, the present failure of the laws of maritime warfare is closely interwoven with the peculiarities of the world war, which constituted a test too severe. Such a gigantic struggle will probably never occur again and international law will not be put to such a hard test.

Moreover, after the conclusion of peace we shall be confronted by essentially improved conditions. Thanks to our submarines, English mastery of the sea, which, according to the strange view of the English, serves as a guaranty to the freedom of the sea,¹ may be regarded in the main as a matter of the past. But Germany, too, shall not and will not assume this position of superiority. For this also would mean the destruction of the freedom of the sea. Whoever amongst us thinks otherwise² thinks after English fashion. Nor can we or do we wish to share with England the mastery of the seas, if one may speak at all of a divided mastery. No one shall rule the seas; the sea shall remain free from all domination.

And the international agreement which is to establish the principle of equal rights on the sea for all States will eventually grow to be the legal expression of a fact that is bound to assert itself in the end irresistibly even without an agreement. Perhaps for that reason only is England willing to enter into negotiations concerning the freedom of the sea after the war. The freedom of the sea was always menaced by England only. But now England has even lost her own freedom of commerce in this war, in the course of which she has been able to summon the entire world in defense of her power. And England will never again enjoy such advantageous conditions for treaties as she has enjoyed during the present war. Every State, eager to emulate in the future the example set at the present by England, will surely find itself opposed by a world no longer willing to degrade herself by becoming the servant of the oppressor.

Thus the most effective safeguard of the freedom of the sea is eventually not an international agreement, but the absolute certainty, which may be looked for to translate itself into a fact, with or without treaties, that all fresh ambitions for world domination will be dashed to pieces against the concert of powers that is bound to appear sooner or later as the guardian of the freedom of the sea. This, too, is the

¹ Concerning the question of consummation see also Steir-Somlo, p. 14.

² As, for example, Trierpel, too, p. 41.

deeper meaning of the system of a world balance so ardently desired by Stier-Somlo.¹

We must always bear in mind that even the best law, for which we must, indeed, continue to strive, will not quite guarantee us the absolute freedom of the sea. In the last analysis, each State will enjoy only so much freedom as it may be able to maintain. For that reason Faust, at the very zenith of his development, declares that, according to the "*highest axiom of wisdom*"—

He only earns liberty and existence,
Who is compelled to win them from day to day.

WÜRZBURG, *Christmas, 1917.*

¹ "Die Freiheit der Meere und das Völkerrecht," 1917, p. 119 ff.

SUPPLEMENT.

In the meanwhile, in an address delivered before Congress on January 8, 1918, *Wilson* proposed a peace program which contains, in section 2, the following demand:

The second condition is the absolute freedom of navigation upon the seas, outside territorial waters, *alike in peace and in war*, except as the sea may be closed in whole or in part by international agreement.

To this the Austro-Hungarian *Minister of Foreign Affairs, Count Czernin*, made the following reply in the Austrian Parliament on January 24, 1918:

The postulate of the President (*Wilson*) expresses the heart-felt desire of all nations. I subscribe heartily and fully to this demand made by America.

In a speech delivered on the same day before the Imperial Parliament, *the Imperial Chancellor, Count von Hertling*, made the following declaration:

The absolute freedom of the seas, *in peace and in war*, is regarded by Germany, too, as one of the first and most important postulates of the future. Thus, there really exists no divergence of opinion. The reservation added by *Wilson* at the end—I need not quote it literally—is not clear and seems superfluous, hence might better be omitted.¹ It would be of utmost importance to the freedom of navigation upon the sea if the strongly fortified naval bases of support situated on important international highways of commerce and maintained by England at Gibraltar, Malta, Aden, Hongkong, on the Falkland Islands, and at several other points, could be given up.

But not only the English Government but also the whole English press arose unanimously against such a proposal, and the *Pall Mall Gazette* pounced upon this opportunity to brand once more and in the usual fashion the doctrine of the freedom of the sea as “stark madness.” In addition, the Germans were accused of ingratitude, and it was pointed out to them that all English coaling stations are just as open to the Germans as to the English. The following reply may be made to this: England speaks only of conditions in times of peace, and even then the Treaty of Paris causes apprehensions for the future. And how England acts in times of war has been

¹ To this *Wilson* made the following reply in his speech delivered before Congress on February 11, 1918: “He (*Count Hertling*) agrees that the seas should be free, but looks askance at any limitation to that freedom by international action in the interests of the common order.” *Wilson* will have to speak more plainly.

shown clearly by the events that took place in 1914. Moreover, England only mentions coaling stations, whereas the imperial chancellor speaks of strongly fortified naval bases of support situated on the important international highways of commerce. And as long as English cannon are aimed on the principal crossing points of the seas at vessels there can be no freedom of the sea which Wilson regarded as absolutely necessary in times of war as well as in times of peace. The throwing open of the English fortified bases of support, by no means categorically demanded by the Imperial Chancellor, but merely suggested as a logical result of the freedom of the sea, is now up for general discussion and will engage public attention until it becomes a reality.

Absolute freedom of the sea even in times of war can not be conceived very well without the abolition of the rights of capture at sea, blockade, and contraband. It will soon have to become clear whether this is really the aim of the German-Austrian-American program. America apparently makes but a limited use of her right to demand absolute freedom of the sea, while England assumes as heretofore an entirely adverse attitude without restraining in the least the manifestation of her opposition. For that reason, further developments ought to be awaited eagerly.

The newspapers to-day (February 16) contain reports of a significant interview granted by Prince Max, of Baden, to Dr. Mantler, the director of the Wolff Bureau, in the course of which the prince, when asked whether the speech of Lord Lansdowne does not seem to point out to him a way out, made the following reply:

The word of an honorable peace has a pleasant sound. The assumption is correct that in preparation for peace an agreement concerning certain general aims must be arrived at, aims arising out of the divergence of special interests and belonging to no one nation in particular but, so to speak, to all peoples. In this respect public discussion is highly desirable.

I shall begin with the demand for the freedom of the seas, rooted so deeply in the history of the German nation. The underlying principle of the freedom of the sea states that noncombatants must be spared the sufferings of war on the sea and on land. A new war of starvation may not be waged again. The secure establishment of the principle of the freedom of the sea would mean more than the mere humane shaping of future wars. It would become a real peace guarantee, because the prospect of being able to abuse unpunished one's sea power constitutes one of the greatest temptations to war.

Prince Max von Baden has also shown in his speeches delivered before the Badenese Upper Chamber that he knows how to view the problems arising out of the war from an exalted vantage point and that he has grasped them clearly in their closest correlation.

WÜRZBURG, *February 16, 1918.*

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REGARDING

THE QUESTION OF TACNA AND ARICA
(1905 TO 1908)

OBSERVATIONS ON THE NOTE OF
HIS EXCELLENCY MR. SEOANE
OF MAY 8, 1908
WITH AN ABSTRACT AND PARAL-
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1918

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COMMUNICATIONS EXCHANGED BETWEEN THE CHANCELLERIES OF CHILE AND PERU.

MINISTRY OF FOREIGN RELATIONS,
Lima, February 18, 1905.

MR. MINISTER: In the second clause of the treaty of peace and friendship which has just been entered into by the Republics of Chile and Bolivia a complete delimitation of boundaries is established, including, in the line from north to south, that of the territory of the Provinces of Tacna and Arica, and also part of that of Tarata.

In the third clause it is moreover agreed to connect the port of Arica with Alto de la Paz by a railroad to be constructed at the expense of Chile within the period of one year from the ratification of the treaty; it being likewise compacted that the execution of the work and its exploitation shall be determined by agreements, concessions, and special arrangements, as the commercial traffic through the port of Arica, according to Article III referred to, and Articles VII, X, and XI.

These pacts oblige my Government to direct to your excellency the present note, which has for its object the making of a formal protest and reservation of the rights of Peru in relation with these stipulations.

By the treaty of peace celebrated in Ancon October 20, 1883, Peru ceded to Chile perpetual dominion over the territory of the Province of Tarapaca, and the possession of Tacna and Arica during the term of ten years, dating from the exchange of ratifications of the treaty, which became effective March 28, 1884.

It is stipulated that—

at the expiration of that term a *plebiscite* shall, by means of a popular vote, decide whether the territory of the Provinces referred to is to remain definitely under the dominion and sovereignty of Chile, or to *continue* to form a part of the Peruvian territory.

That country to which the Provinces of Tacna and Arica shall remain annexed shall pay to the other 10,000,000 pesos in Chilean silver currency, or in Peruvian soles of the same standard and weight.

This pact is an essential part of the treaty of peace, so much so that it stipulates that even the protocol establishing the form of the plebiscite, and the terms and time for the payment of 10,000,000 pesos by the country which shall remain in possession of Tacna and Arica, "shall be considered as an integral part of the treaty."

By said pact, then, Peru ceded to Chile absolute propriety over the territory of Tarapaca, and the mere possession of the Provinces of Tacna and Arica, whose dominion Peru did not relinquish except on condition that their definite status should be submitted to a plebiscite which it was stipulated should be held 10 years from the ratification of the treaty, or March 12, 1894.

To safeguard more completely the rights of Peru from every stipulation affecting them in the treaty of peace between Chile and Bolivia, it suffices to consider that in the treaty of Ancon of 1883 one

of the contracting parties was the same Republic of Chile; and that the Republic of Bolivia, besides having had knowledge of and unusual interest in those acts, has always recognized the rights of Peru over the territories of Tacna and Arica. It is worthy of mention and very just to point out that, in the recent treaty of delimitation of frontiers and of arbitration, which was celebrated with Peru on September 23, 1902, and which was ratified on the 30th of January, that year, the following is laid down in the second clause:

The high contracting parties agree equally in proceeding according to the stipulations of the present treaty to the demarcation of the line which separates the Provinces of Tacna and Arica from the Bolivian line of Carangas, immediately after these are again under the sovereignty of Peru.

These being the facts, and the condition established by the treaty of Ancon respecting the territory of the Provinces of Tacna and Arica, they can not be modified or affected by pacts or stipulations in which Peru has not participated; but my Government considers, in view of the expressed stipulations of the treaty of peace celebrated by your excellency's Government with that of Bolivia, that its imperative duty in the representation and defense of the national interests obliges it to renew expression of its inalienable rights.

The demarcation of frontiers, construction and exploitation of railroads, conditions of free mercantile traffic, obligations and concessions which might affect the territories and their seigniorial rights, are acts of dominion in the exercise of full and absolute disposition of property and sovereignty which belong by indisputable international and civil law to the lord and master, and not to the possessor, or mere occupant, which is the status of Chile in the territories of Tacna and Arica.

To make these acts binding, it was necessary that such arrangements should have been made in agreement with Peru, or that the plebiscite to which the treaty of Ancon submitted them should have resulted in favor of Chile.

Neither the one nor the other thing has occurred, so that my Government finds itself obliged to declare that Peru does not accept or recognize these arrangements in which she has had no part; that they are not, for that reason, binding in any sense, and that they can not modify the legal status of the territory of Tacna and Arica, over which Peru continues to hold dominion, Chile being merely an occupant and holder, whose legal title terminated 10 years ago when the plebiscite to which the treaty of Ancon refers should have been effected.

It would certainly not be necessary for my Government to make these declarations and reservations were not said Provinces in an irregular and anomalous situation which it is not longer possible to maintain.

In fact, the time stipulated in the treaty of Ancon, March 28, 1894, for deciding by plebiscite the definite status of the Provinces of Tacna and Arica has expired, and the plebiscite, nevertheless, has never been held, in spite of the fact that there was proclaimed on the 16th of April, 1898, the protocol for its execution, which was an integral part of the treaty of 1883.

This protocol, being approved by both Governments and by the Congress of Peru and the Senate of Chile, the Chamber of Deputies

of this country, without itself pronouncing upon the pact, agreed that there might be arranged directly between the two Governments the points which ought to be resolved by arbitration, with the purpose of fulfilling article 3 of the treaty of Ancon, so that it devolved upon the Government of your excellency that it should initiate appropriate action, not, however, initiated to this day.

The question of Tacna and Arica is not a matter over which two countries may freely debate as they believe most convenient to their interests. It is an international matter, governed by a treaty binding on both nations which are parties to it and which both sealed with their good faith. From whatever consideration of convenience one may endeavor to contemplate it, there supervene the severe precepts of justice and imperious respect for contracts entered into, which it is not possible to violate without the gravest offense to law, to civilization, and to the respectability of nations.

The stipulations which the treaty of peace between Chile and Bolivia contains, referring to the Provinces of Tacna and Arica, make it even more impossible to elude the immediate celebration of the plebiscite contained in the treaty of Ancon, since it is inconceivable that this should not be fulfilled, or that one of the parties should adjust with a third party which depend upon the definite status of those territories, which the plebiscite established in said peace pact of October 23, 1883, ought to determine.

Your excellency well knows with what persevering, honorable, and arduous purpose the Government of Peru has undertaken, on its part, to effect the plebiscite in the Provinces of Tacna and Arica. It can never be imputed to my Government that it has not maintained this purpose whose realization is imperatively demanded by justice and the high interests of both countries, committed, on their national honor, to the fulfillment of the treaty.

Meanwhile there has been created in Tacna and Arica a unique international situation, since the history of political relations between nations furnishes no precedent for a territory submitted by a public and binding treaty between two countries to a plebiscite which remained, nevertheless, in the power of one of them after the expiration of the time fixed for the expression of the popular will which should definitely decide its fate.

Such a situation, anomalous and singular, is contrary to the treaty of Ancon; and obstructs Chile after the expiration of the 10 years of precarious possession which this treaty gave to her over the Provinces of Tacna and Arica, from modifying in whatever form the condition of that territory and from contracting obligations and public agreements which could affect them, even depriving her now of the status of possessor, which before the law does not exist when there is no legal title to sustain it.

I ought likewise to protest that the demarcation of frontiers contained in the treaty of peace between Chile and Bolivia delimits part of the territory of the Province of Tarata, which Chile unjustly occupies and continues to retain.

To the stipulation in the treaty of Ancon concerning the Province of Tacna, there could never be applied territories which in their political and geographical demarcation constitute the Province of Tarata, to which in nowise does the treaty refer.

Those territories are not included, in any event, within the line fixed by the source of the River Sama, which the treaty of Ancon points out as the northern boundary of the Province of Tacna, from its rise in the Cordilleras bordering upon Bolivia to its entrance into the sea, since the true origin of this river is indisputable, as the Government of Peru has presented in constant remonstrances on this point which it has placed before your excellency.

The undersigned entertains no doubt that the rectitude of your excellency and your Government must recognize these facts and agree with mine that the stipulations of the treaty of peace and friendship ratified between the Republics of Chile and Bolivia can not modify the status of the territory of the Provinces of Tacna and Arica, under the treaty of Ancon; and will accept, on the other hand, that whatsoever pacts may be adjusted respecting these Provinces, such pacts can in no sense bind Peru, she not having been a party to such arrangements, nor can they affect her territorial rights over the Provinces of Tacna, Arica, and Tarata.

With assurances, Mr. Minister, of my highest and most distinguished consideration.

J. PRADO Y UGARTECHE.

To His Excellency the MINISTER OF FOREIGN RELATIONS OF THE REPUBLIC OF CHILE.

MINISTRY OF FOREIGN RELATIONS,
Santiago, March 15, 1905.

MR. MINISTER: There has been received in this ministry the communication of your excellency dated February 18 last, which your excellency states has for its object the making of a "formal protest and reservation of the rights of Peru" under the stipulations contained in the second and third clauses of the treaty of peace and friendship of October 20, 1904, the first of which refers to the demarcation of frontiers between Chile and Bolivia, and the second to the construction of a railroad which will unite the port of Arica with Alto de la Paz.

Your excellency founds your protest on the fact that, by the pact of Ancon—

Peru ceded to Chile absolute propriety over the territory of Tarapacá, and the mere possession of the Provinces of Tacna and Arica, whose dominion Peru did not relinquish except on condition that their definite status should be submitted to a plebiscite which it was stipulated should be held 10 years from the ratification of the treaty, of March 12, 1894.

Yóur excellency adds that—

The demarcation of frontiers, construction, and exploitation of railroads, conditions of free mercantile traffic, obligations and concessions which might affect the territories and their seigniorial rights, are acts of dominion in the exercise of full and absolute disposition of property and sovereignty, which belong by indisputable international and civil law to the lord and master, and not to the possessor, or mere occupant, which is the status of Chile in the territories of Tacna and Arica.

This is not the first time that the Government of Peru has deemed it necessary to protest against the political and administrative measures taken by Chile in the territories of Tacna and Arica; and as, on the one hand, your excellency's note is founded on considera-

tions analagous to those which are adduced in said protests, and, on the other hand, your excellency is careful to state that your principal object is that of testifying that the treaty of peace and friendship to which your excellency refers is binding only on the Republics of Chile and Bolivia and not on Peru, a fact which my Government has always held in doubt, I can well limit myself to reproducing the replies which this ministry has opportunely given to the Peruvian chancellery.

Nevertheless, given the good will which exists in my country to cultivate friendly relations with the country of your excellency, I take pleasure in setting forth that the acts which your excellency protests against are not contrary to the treaty of Ancon, but that, on agreeing to its execution, the Government of Chile has proceeded in the exercise of the indisputable rights which that treaty confers upon it.

Your excellency contends that the pact of Ancon reserves to Peru dominion over Tacna and Arica and confers upon Chile only a mere precarious occupation, and, going on to refer to the rules of international and civil law, adds that Chile could not execute in said territories any act of dominion or sovereignty without the acquiescence of Peru. It is not difficult to demonstrate that this interpretation does not conform either with the letter or with the spirit of the pact mentioned.

In fact, your excellency is not unaware that a portion of territory belongs to the State which, with sufficient title, has the ability to occupy it and subdue it to its authority and legislation, and as the third article of said treaty establishes that the territory of the Provinces of Tacna and Arica "will continue possessed by Chile and subject to Chilean legislation and authority" it is evident that Peru ceded to Chile complete and absolute sovereignty over these Provinces, without any limitation as to its *exercise*, and limited only in its *duration* by the holding of a plebiscite, which should be called after 10 years had passed, dating from the ratification of that treaty, as it states.

The period of 10 years which the treaty of Ancon establishes had no other object than to insure to Chile a minimum of time in the exercise of sovereignty; but it in no manner signifies that within that period there ought necessarily to have been a consultation of the popular will. This point has been considered in previous communications which are in the possession of the Peruvian chancellery. In those communications it has been shown likewise that the delay in calling the plebiscite is not attributable in Chile.

"At the expiration of that term," adds article 3, "a *plebiscite* shall, by means of a popular vote, decide whether the territory of the Provinces referred to is to *remain indefinitely* under the dominion and sovereignty of Chile, or to continue to form a part of the Peruvian territory."

In order that this territory may remain definitely under the dominion and sovereignty of Chile, it is necessary that this country should have temporarily exercised and enforced said rights. The word *continue*, which your excellency underscores in your communication, does not refer to the situation prior to the treaty but to that which might come to pass after calling the plebiscite. Otherwise

there would exist a contradiction in the terms of the third article into which those who edited it could not have fallen.

The rights of Chile and Peru with respect to the Provinces of Tacna and Arica, such as are defined in the treaty of Ancon, are, then, quite different; those of Chile are actual and plenary, but not definite; those of Peru are merely fortuitous.

The weight which my Government gives to article 3 of the treaty of Ancon takes into account not only its explicit terms but also the recent declarations which the Government of your excellency has made to a friendly State.

The second article of the treaty of delimitation of boundaries celebrated between Peru and Bolivia the 23d of September, 1902, and ratified the 30th of September, 1904, which your excellency so opportunely transcribes in the note I am replying to, speaks thus:

The high contracting parties agree equally in proceeding according to the stipulations of the present treaty to the demarcation of the line which separates the Provinces of Tacna and Arica from the Bolivian line of Carangas, *immediately after these are again under the sovereignty of Peru.*

Your excellency's Government recognizes, for the same reason, expressly, in this treaty that the Provinces of Tacna and Arica are not actually under the sovereignty of Peru, and, what it is important to recognize in implicit form, that this sovereignty is exercised by Chile. If therefore the united rights which territorial sovereignty carries with it are considered, your excellency will understand that the protest which you formulate is not in accord with a recognition as categorical as it is spontaneous.

It is true that your excellency contends in various parts of your communication that Peru has conserved the dominion of those territories, and that it "continues to hold dominion over them." But your excellency is doubtless not unaware that the traditional doctrine of dominion or propriety which a State exercises over the territory subject to its jurisdiction tends to disappear absolutely from modern international law, and that it applies only in civil law, which does not govern relations between States. On the other hand; even within that doctrine, it is well known "that to territorial sovereignty belongs exclusively dominion over the whole extension of its possessions and that only from this point of view and considering alone the international situation of the State can it be said that it is the proprietor of its territory."

The convention celebrated between Peru and Bolivia shows, besides, that the latter Republic has taken into account the international situation of Tacna and Arica in celebrating two treaties relative to the delimitation of their boundary; one with Chile, the country which actually exercises sovereignty and dominion in those territories, and the other with Peru, which has only a mere prospect of exercising them. In the treaty celebrated with Chile the boundary which the two countries shall fix between themselves in the Provinces of Tacna and Arica is stipulated; in that celebrated with Peru, it is declared that both countries shall fix, by common agreement, that boundary in case said Provinces return to the sovereignty of Peru. The prospects of Peru are, then, carefully contemplated in said treaties.

Your excellency has also esteemed it opportune to call the attention of this Government to the fact that—

the history of political relations between nations furnishes no precedent for a territory submitted by a public and binding treaty between two countries to a plebiscite which remained, nevertheless, in the power of one of them after the expiration of the time fixed for the expression of the popular will which should definitely decide its fate.

It is scarcely permissible that I should set forth to your excellency that the precedents which you invoke in this paragraph do not exist, because all the international plebiscites held within the last two centuries have been but hypothetical measures or for the purpose of sanctioning an annexation already made, as those called during the French Revolution, or to attenuate an annexation or cession already made, as those which have taken place in the nineteenth century. The result, as a natural consequence, has always been favorable to the annexing country, which never yet saw in these plebiscites any discussion of its rights but only a mere formality.

It is not out of place to remind your excellency that the treaty of Prague, celebrated between Prussia and Austria on August 23, 1866, stipulated a plebiscite in favor of the Danish population of Schleswig, occupied by Prussia; but this stipulation remained without effect according to subsequent arrangement, because the Austrian Government, appreciating the situation, and not because they or the Danish population wished it, but in conformity with the reality of things, recognized the annexation of that portion of territory to Prussia as an act consummated.

The conclusion which may be clearly drawn from the diplomatic precedents on plebiscites is that their stipulation has never had other object than to bring about, in a form respectful to national sentiment, a cession or annexation of territory.

Moreover, your excellency is not unaware that modern diplomacy has conceived other methods for covering territorial annexations or cessions. Within the limits of this communication an analysis of these procedures would not be possible, nor would it be possible to review the numerous cases in which they have applied.

Nevertheless, it is not too much to bring to mind that in some of these cases, where the cession was apparently limited to the simple occupation and administration of territory, it has been considered that there was implied a cession which has authorized the occupying State to exercise the rights inherent in dominion and sovereignty.

I do not assume, certainly, to place these cases on a parallel with the situation which exists in the territory of Tacna and Arica, respecting which there is a treaty conferring expressly upon Chile complete and absolute sovereignty as regards their exercise, and limited only by an eventuality.

These facts and precedents justify the declaration which I made to your excellency that the Government of Chile refuses to admit that the Government of Peru is unaware of its indisputable right to exercise dominion and sovereignty in the Provinces of Tacna and Arica pending the decision of a plebiscite, not even yet called by reason of circumstances which the chancellery has already had occasion to analyze and reveal to the Government of your excellency, as to whether these Provinces shall be reincorporated or not in the territory of Peru. Chile can now fulfill, and will fulfill even more than in the

past, the duty of giving these Provinces the largest measure of material and moral well-being, and of implanting in them all the means of order and progress which may be necessary to guarantee the unity of sentiment and interest which permit her, under the solemn dispositions of the treaty of Ancon and without changing or violating the prospects of Peru, to acquire definitely the dominion and sovereignty over Tacna and Arica.

Finally, I ought to express to your excellency that, to the firmness with which I maintain the incontrovertible rights of my country, it gives me pleasure to add the sincerity with which in the name of my Government I invite that of your excellency to procure an agreement based on the interest and convenience of both Republics and inspired by the same purposes with which Chile has placed an end to all questions with reference to other State boundaries. In this field, which is that of reality in the life of the peoples, the agreement between Chile and Peru would be immediate, absolute, and lasting. Your excellency may feel assured that if the Government of Chile aspires to this definite arrangement, it is because it desires to march in harmony with the course imposed upon it by events and by being fully convinced that moral, political, and economic solidarity is the fundamental law of nations.

With assurances, Mr. Minister, of my highest and most distinguished consideration.

LUIS A. VERGARA.

To His Excellency the MINISTER OF FOREIGN RELATIONS OF PERU.

MINISTRY OF FOREIGN RELATIONS,
Lima, April 25, 1905.

MR. MINISTER: The secretary of the legation of Chile has delivered to this office the note of your excellency of March 15, last.

Your excellency recognizes in it that the stipulations of the treaty of peace and friendship celebrated between Chile and Bolivia October 20, 1904, giving rise to the note of protest of my Government of February 18, last, do not bind or affect Peru in those rights which, according to the treaty of Ancon, she maintains over the Provinces of Tacna and Arica; but, at the same time, your excellency has believed it fitting to adduce diverse considerations to prove that in said Provinces Chile exercises temporary dominion and sovereignty, sustaining thus theories which are in disagreement with the letter and the spirit of the treaty of Ancon, and with the fundamental principles of international law.

By its own nature, sovereignty, which is the supreme faculty of peoples to establish and govern themselves and proceed free and independent; and dominion, which is the right likewise of free and absolute disposition of property, representing together the fullness of nationality, of political government, and of territorial rights, are incompatible with a provisional status, precarious, for a fixed time, at whose expiration, in accordance with an international pact, sovereignty and dominion shall be determined.

In the exercise of sovereignty, a people has not the authority to decide on nationality and seigniorial rights, nor in the exercise of dominion that of disposing of territorial property, an authority

which can not exist while the nationality and ownership of the territory are dependent upon those to whom these belong.

There are examples of limitation in the amplitude of the rights of sovereignty and dominion, as in the ancient fiction of semisovereign States, and in the condition of protected and tributary States; but absolute sovereignty and dominion can not be given for a limited time and in uncertain status, since the character of firmness and the effects of perpetuity constitute essential attributes of those rights, whose subsistence and exercise are irreconcilable with a State in which the nationality, to which corresponds sovereignty, and the personality of the owner, to which pertains dominion, are subject to the result of a projected plebiscite.

Neither can it be sustained, before public law, that sovereignty and dominion can be acquired, except in cases where force is employed, without cession from the sovereign and owner of the territory.

To Peru belonged the Provinces of Tacna and Arica.

By the treaty of Ancon of October 20, 1883, she ceded to Chile perpetually and unconditionally the Province of Tarapacá.

Respecting the territory of the Provinces of Tacna and Arica, she entered into a pact, which, according to the text, provided that it would—

remain in the possession of Chile, and subject to Chilean laws and authorities, during the term of 10 years, to be reckoned from the ratification of the present treaty of peace.

At the expiration of that term a plebiscite shall, by means of a popular vote, decide whether the territory of the Provinces referred to is to remain definitely under the dominion and sovereignty of Chile, or continue to form a part of the Peruvian territory.

This pact is entirely clear and precise and can not give rise to any doubt.

The territories of Tacna and Arica were at that time under the military occupation of Chile, with the character and effects of simple tenancy and provisional administration which the law of nations uniformly points out.

In the treaty of Ancon it is expressly agreed that during a certain period that possession should be continued, but sovereignty and dominion, which the treaty so carefully stipulated with respect to the Province of Tarapacá, were not ceded, reservation being made in regard to Tacna and Arica that the result of the plebiscite at the end of 10 years expired March 28, 1894, should decide definitely the fate of those Provinces.

It is possible to comprehend the particular within the general, the accessory within the principal, the accidental within the substantial, but it is not possible, in contradiction to the order of ideas and of every legal principle, to proceed on the contrary and comprehend sovereignty and dominion as a corollary of possession and its effects, which was the only thing stipulated in the treaty of Ancon for 10 years of Chilean occupation in Tacna and Arica.

Your excellency, with the intention of supporting your theory of sovereignty and temporary dominion, invokes the recent treaty of delimitation of boundaries celebrated between Peru and Bolivia September 23, 1903, in which it is agreed:

ARTICLE 2. The high contracting parties agree equally in proceeding according to the stipulations of the present treaty to the demarcation of the line which

separates the Provinces of Tacna and Arica from the Bolivian line of Carangas, immediately after these are again under the sovereignty of Peru.

The cultivated judgment of your excellency will easily appreciate that in said treaty it is declared that the sovereignty and dominion of the said Provinces belong to Peru, and that she has not renounced them, although recognizing that their exercise was in suspense, as a matter of fact, in consequence of the treaty of Ancon.

In the political order, as in the civil, the exercise of a right could, in sundry cases, be found in suspense, but the right in itself does not disappear except for causes which legally extinguish it or transfer it.

On the other hand, a right can not be exercised unless it is possessed either by a proper title or by transfer from the possessor and assigned to the one who is to exercise it.

To the incontrovertible force of these principles of universal law is not opposed the fact that, pending decision of the status of the Provinces of Tacna and Arica, they should be subject, in internal and civil order, to Chilean authority and legislation, which is the true and only condition established by the treaty of peace of 1883 in the Provinces of Tacna and Arica during the 10 years of possession which were granted to Chile, a title which legally ceased after the expiration of that period.

Your excellency insinuates that in the treaty of Ancon the date of the plebiscite is not definitely fixed; but there is no doubt but that in the treaty it is stipulated that the plebiscite shall be held at the expiration of 10 years from the occupation, or March 28, 1884, it not being material to indicate the date, since it is exactly determined, commencing, says the agreement, with the ratification of the treaty.

When the treaty of Ancon was negotiated and approved, and always afterwards, the Chilean chancellery understood it so, invariably, without any adverse opinion ever having been sustained.

Finally, your excellency has thought it worth while to recall cases which you hold as covering territorial cessions by means of plebiscites, but whatever may be your estimation of them, they are not illustrative of this situation, entirely distinct and unique, which is categorically and faithfully resolved in the treaty of Ancon.

In the peace negotiations between Chile and Peru which preceded the treaty of Ancon, Chile demanded, besides the cession of Tarapaca—whose importance and riches had surpassed all calculations—an indemnity in money of 20,000,000 pesos, which was not accepted by Peru.

The Chilean negotiators then proposed to compensate her by the sale and cession of the territory of the Provinces of Tacna and Arica, to which also the Peruvian negotiators refused absolutely to assent.

As a final result, and without any other intelligence respecting it, an agreement was reached in the stipulation of the treaty of Ancon for the continuation of said territories in the possession of Chile for 10 years, at the expiration of which a plebiscite would be held to determine, by popular vote, the definite sovereignty and dominion, with the obligation by the country in whose favor it may be decided to pay 10,000,000 pesos to the other contracting party.

These are the true antecedents of those negotiations, and are amply confirmed in the memorial presented by the Chilean chancellery to the National Congress in 1883, a document of force and authentic

worth for your excellency, in which, on submitting the treaty to the approbation of the Chilean Congress, was given the detailed history of said negotiations, ending with these words:

If the result of the plebiscite shall return the region of Tacna and Arica to the dominion of Peru, Chile will loyally and honorably respect the decision of those peoples, limiting herself to receiving a pecuniary compensation of 10,000,000 pesos, which, added to the revenue we would have procured anticipating the occupation of those territories for 10 years, would exceed, without doubt, what we claimed on the basis proposed in 1881 and 1882.

Peru, then, by explicit and categorical stipulations, ceded directly and definitely the very valuable Province of Tarapaca; but respecting Tacna and Arica she accepted no other stipulation than that expressly contained in that international pact, under the public and inviolable faith of those countries which celebrated it.

Thus your excellency will recognize, although deducing from said treaty the equivocal interpretations which my Government finds itself obliged to rectify by the present note.

Disagreement on so important and delicate a matter demonstrates even more the imperious necessity which I expressed to your excellency in my previous communication of February 18 last of fulfilling the treaty of Ancon, and holding the plebiscite agreed to in it, which ought to have been done 10 years ago.

Your excellency states that the delay can not be attributed to Chile. This chancellery maintains that it is very easy to verify the fact that Peru has always been disposed to the immediate execution of the plebiscite stipulated in said pact.

But your excellency appreciating, at all events, the absolute necessity and justice of putting an end to this anomalous and irregular international situation invites my Government to negotiate and definitely conclude this most important matter.

It is very pleasing to the Government of my country to accept the invitation of your excellency, with the object of negotiating the execution of the treaty of Ancon respecting the Provinces of Tacna and Arica, it being at the same time convinced that nothing will contribute more toward binding the cordial relations which your excellency states should unite American peoples for the realization of their united destiny than the faithful fulfillment of international agreements and the ties of reciprocal interests.

Please accept once more the assurances of my high and distinguished consideration.

J. PRADO Y UGARTECHE.

To His Excellency The MINISTER OF FOREIGN AFFAIRS,
Santiago, Chile.

MINISTRY OF FOREIGN RELATIONS,
Santiago, June 5, 1905.

MR. MINISTER: I have received the communication of your excellency of April 25 last, designed to rectify the mistaken interpretations into which, according to your excellency, I have fallen in my note of March 15.

Naturally respecting the opinions of your excellency, allow me to call your attention to the circumstance that the doctrines expressed by this chancellery, and which your excellency rectifies, are not only

in accordance with the principles of international law, but also with the practical application of these principles which has invariably been made by European States.

As for the rest, my Government felicitates itself that your excellency has accepted the invitation which I permitted myself to make in my note to which you refer with the purpose of procuring an agreement based on the interest and convenience of both Republics, and inspired by the same purposes with which Chile has disposed of all questions with the rest of the contiguous States.

With the assurances of my highest and most distinguished consideration.

LUIS A. VERGARA.

To His Excellency The MINISTER OF FOREIGN RELATIONS OF THE REPUBLIC OF PERU.

[Confidential.]

No. 3.

MINISTRY OF FOREIGN RELATIONS,
Santiago, March 25, 1905.

MR. MINISTER: The first interview which your excellency held with the undersigned served to formulate the desire of taking up immediately the solution of the problem concerning the definite nationality of Tacna and Arica, according to the dispositions of the treaty of peace signed in Ancon.

The undersigned permitted himself to offer a suggestion directed toward ascertaining beforehand if it would be more convenient to study in the first place the problem of Tacna and Arica or the distinct projects designed to create and promote friendly international ties, and declared that on his part he was inclined to take the latter course, as much because such has been the proceeding preferred by the Government of Chile in promoting the renewal of diplomatic relations between the two countries, as because this seems also to have been the thought of Peru in accepting the invitation of Chile for said renewal and in entering fully upon this path, celebrating a short time ago with our legation in Lima three conventions of distinct classes; and moreover because that seemed also to be the dominant note in Peruvian public opinion, judging by the publications of some of the organs of its press.

Your excellency states that for your Government the question of Tacna and Arica is of so vital importance that before it all others appear diminutive or simple in solution, and has the goodness to invite me formally to resolve the question to its simplest terms.

Notwithstanding this difference in the manner of considering what procedure would be most acceptable, I am pleased to testify that in the various conferences held with your excellency to date there has been perfect accord in the sense that it is for us an elementary duty to seek for adequate means to reestablish and guarantee between the two countries a relation of frank cordiality, convinced as we are that it will be fruitful in benefits for Chile and for Peru and would correspond to the dictates of historical sisterhood and the requirements of their full future development.

Seeking to harmonize the desires manifested by your excellency with the ideas which animate my Government, I have the honor to

state to your excellency that Chile and Peru would perform a practical, foresighted, and patriotic work in compassing the solution of the territorial controversy in a series of agreements tending to establish firmly the community of interests between the two peoples.

I had, as regards this, the honor to propose to your excellency a plan of negotiation which consists of various projects of agreement and whose execution would, in the judgment of my Government, satisfy the reciprocal desires for peace which predominate in both Republics.

Perhaps on account of having been presented with some vagueness, these propositions did not have the fortune to be understood with perfect clearness; as one is led to believe by the response of the Government of Peru which, as regards these propositions, your excellency has sent to me.

I propose in the present communication, in accordance with the announcement of your excellency, to make formal and precise the fundamental basis of said plan and thus to save it from the failures and errors inherent in the memory, as well as to set forth to your excellency and to your Government a concrete basis for deliberation.

Persuaded as my Government is that no chain binds more strongly the nations than that of community of interests, from which results the common welfare, it is of the opinion that Chile and Peru will not have made the work complete by only eliminating the hindrance which the question of Tacna and Arica opposes to the absolute cordiality of their relations and entertains the confidence that, linking the solution of this arduous problem with that of various others which by their nature are harmonious and of reciprocal profit, the solution will be greatly facilitated. The joint negotiations which I have the honor to outline to your excellency embrace the following matters:

1. Arrange a commercial convention which shall grant exemption from customs to certain stated products of each country that are of use in the other.

2. Celebration of an agreement for the promotion of the merchant marine and for the establishment of a line of steamers at the expense or by the subvention of the two Governments, with the object of developing a coast trade.

3. Association of the two countries for the realization of their resources and their credit in joining the capitals of Santiago and Lima by railway.

4. Arrangement of the protocol for establishing the form of plebiscite stipulated for the determination of the definite nationality of Tacna and Arica.

5. Arrangement to raise the amount of indemnity which the country acquiring definite sovereignty over this territory shall give to the other.

I trust that your excellency and his intelligent and patriotic Government can not do less than find in the union of these proposals for agreement a proof of the sincerity of our desire to seek as well as to assure forever with Peru the greatest cordiality of relations; and can not do less than be persuaded that there is evident convenience in giving to the negotiation which we have in hand all the amplitude which I have drafted. Reduced to the mere organization of a plebiscite, it might well occur that the country which was a loser in its ex-

pectations of triumph might remain ill disposed, at least for a time, to maintain with the other the friendship which we desire. Let us at once be rid of every cause of subsequent disquietude. A negotiation in which it is attempted at the same time to eliminate existing difficulties and give guaranties of future cordiality will inspire, without doubt, greater confidence in its results.

In the very act of carrying out the plebiscite there will be felt the wholesome influence of a previous agreement between the Governments on the matters included in my proposition: In not arranging for the plebiscite alone, the voters would not arrive at the polls frightened lest their vote might engender new germs of estrangement; because they would have the assurance that its result, whatever it might be, would not retard the acquisition of any of the benefits of peace, which are already assured beforehand.

This combined negotiation, by consisting of diverse elements which complete and compensate each other, ought naturally to be considered as an indivisible one.

I need say but little in explanation or justification of the first and the second of these projects which constitute the proposed negotiation.

The free importation of its own products from one of the two countries into the other brings indisputable benefits; and in the present case the fundamental difference of zone between Chile and Peru gives origin to differences of production which perfectly allow of the reciprocal liberation from heavy customs of those products peculiar to each country; sugar, rice, Peruvian cattle, for example, and the cereals, wines, and fruits of Chile could under such favorable conditions find in the other country a most advantageous placement.

The development of trade navigation, apart from the gain which this industry in itself offers, will contribute directly to making commercial interchange possible and easy.

The construction of the remaining lines of railroad which are missing between the capitals of the two countries is in my opinion a work which imposes itself on the consideration of both Governments for many reasons, not only as a national convenience, but as of true continental interest and security. The Republics of Chile and Peru will contribute thus, in considerable proportion, to the realization of the Pan American Railroad, an indispensable element for securing the moral unity of America, and a palpable manifestation of the true sentiment which ought to inspire the foreign policy of all the Republics of the continent.

For the construction of the work the two Governments could contract jointly a loan with the work itself as security, or could contract for the construction with a certain interest on the capital invested guaranteed.

Naturally the obligation contracted would be for an identical sum by both States and to fix the amount the lowest estimate between the Peruvian and Chilean sections might be taken; all within a certain prudent maximum which would be fixed beforehand.

In reference to the protocol which will determine the conditions in which the plebiscite of Tacna and Arica would have to be held, I ought to be in this respect a little more explicit as I have been in the discussions held with your excellency on its possible basis.

But, before all, I deem it necessary to recall a fact related with the present negotiations which throws abundant light on the spirit which animated my Government when it opened the way, and which continues to animate it at present.

In March, 1901, the Government of Peru withdrew its legation accredited to Santiago and allowed four years to pass without reestablishing it and without manifesting in any form the purpose of doing so.

And, on the contrary, judging from the tone of certain documents emanating from her chancellery, Peru seemed inclined to maintain for an indefinite time that interruption of relations.

Nevertheless, this ministry, in charge at that time of my distinguished predecessor, Mr. Luis Antonio Vergara, in replying to the last of these documents, dated February 18, 1905, presented to the Government at Lima spontaneous and sincere words in behalf of a rapprochement, and he invited your Government to reestablish in our country its legation in order "to procure an agreement based on the interest and convenience of both Republics and inspired by the same purposes with which Chile has placed an end to all questions with reference to other State boundaries. In this field, which is that of reality in the life of the peoples," he summed up, "the agreement between Chile and Peru would be immediate, absolute, and lasting."

Your excellency must believe me that in referring to these facts it is far from my purpose to awaken unpleasant recollections. I mention them solely to testify authentically that my Government never, even in the days when Chile and Peru were more estranged, felt any weakening in her friendly sentiments.

If Chile had not been animated by this spirit, the diplomatic interregnum would have continued and there would have been on place for opening this negotiation, which I, for my part, have taken up with the well grounded hope that it will lead us to a satisfactory result.

Your excellency knows well that the treaty of 1883 on leaving to be determined by plebiscite the definite nationality of Tacna and Arica did not express what was to be understood by said plebiscite, nor did it fix the forms and manner of its execution. Naturally such omissions can not be attributed to forgetfulness on the part of the negotiators, but to an implicit recognition that the procedure agreed upon could not be other than that of the plebiscites incorporated in the History of International Law.

My Government, then, now desirous as before, of arriving at a friendly solution, would not be disposed to hold strictly to the rights which are accorded to it in the letter and the spirit of clause 3 of the treaty of Ancon nor to maintain itself exactly in the field in which publicists and diplomatic precedents place plebiscites, if on her part Peru will facilitate the arrangement and renounce her extreme pretensions, which will undoubtedly frustrate any solution.

It will not escape the intelligent judgment of your excellency that the right to vote has not in this case the purpose and significance which the constitution and the internal laws of each State attribute to the political suffrage. Its character is eminently international, as it treats of the determination as to which country belongs definite sovereignty over a portion of territory. There is no doubt, then, that

there ought to be called to exercise the rights of suffrage all the able inhabitants of the territory; not only the nationals of the one or the other country interested who have established residence in the territory and are free from all unfitness or incapacity, but also the foreign residents who are in a similar status.

In the plebiscite the will of the foreigners should be consulted as much because their right has been implicitly recognized in the treaty in employing the formula "popular vote" as because it is not equitable or reasonable to deprive them from participation in a consultation over the fate of the country where their interests are rooted, where they have established their family, and to whose prosperity they contribute in large part with fruitful and persevering labor.

My Government understands also that by the fact of exercising sovereignty in Tacna and Arica it devolves upon it exclusively to designate the personnel which ought to preside in holding the plebiscite, whether in the reception of voters or in the scrutiny of the ballots.

And with this motive it gives me pleasure to repeat to your excellency the most absolute assurances of the resolution which my Government has of adopting the means and formalities most adequate for the elimination of any cause for the least lack of confidence on the part of your excellency in order that the result may leave no margin for recriminations of any kind.

Entering a little into the details which are for your excellency a matter of preoccupation, I can say that it does not appear to me unfitting that our authorities, in constituting the electoral board, should give representation on it to citizens of Peruvian nationality and of other nationalities.

The project of agreement which I have the honor to propose to your excellency under No. 5 would stipulate an increase in the sum of money which ought to be paid to the other State, in the character of an indemnity, by the State in whose favor the plebiscite may result.

The undersigned considers that this would be one of the two most effective means of attaining his dominant purpose, which is the solution of this problem with the least possible friction.

The amount of this sum could be fixed between two and three millions of pounds sterling.

The periods, security, and conditions of its payment would be fixed of common accord in the form which shall be judged most simple, convenient, and secure.

A form which in my judgment would render the financial operation considerably smoother would be that of combining the payment of the indemnity with that of the debt which would be contracted for the construction of the international railway.

When applied to this purpose the amount paid would lose the character of compensation which the treaty of Ancon holds; it would tend to smooth over the memories of our past discords and serve to emphasize only the purpose of making indissoluble the union of our two countries.

I congratulate myself, most excellent sir, on being able to register here my gratification in the noble attitude of high-mindedness and faithfulness which your excellency has invariably maintained during our deliberations.

To correspond to it worthily I have at all times endeavored to reveal to your excellency with the most absolute sincerity and exactitude the true sentiments which the people and Government of Chile entertain for Peru, and I flatter myself with the belief that your excellency will be convinced that there reigns in Chile an ardent desire to discover and adopt a formula which, without unfair sacrifices, may permit her to reconcile the fulfillment of these duties—that of establishing again the old harmony between Chile and Peru with that of safeguarding the vital interests of the fatherland.

On the present occasion, will your excellency permit me to close by expressing the hope that your excellency's Government will coincide with mine in the conception that the union of arrangements here proposed takes into consideration the convenience of the two countries, is capable of dissipating all lack of confidence between them, and tends to open to them a new era of prosperity, reestablishing the brotherhood of those times in which the Chilean and Peruvian banner guided our armies and fleets, whether to the conquest for independence or for its defense.

I take this occasion to renew to your excellency the assurances of my most distinguished consideration.

F. PUGA BORNE.

To His Excellency Dr. WILLIAM A. SEOANE,
*Envoy Extraordinary and Minister Plenipotentiary
 of Peru and Chile.*

LEGATION OF PERU IN CHILE,
Santiago, May 8, 1908.

MR. MINISTER: I have the honor to reply, according to the instructions received from my Government, to the communication of your excellency of March 25 last.

Aside from the conception formed of the proposals which it contains, my Government has received with especial pleasure the friendly spirit which inspired said proposals; and I have been charged with the duty of setting forth to your excellency at the same time with what ardor Peru desires to see eliminated once for all the difficulties which oppose the fraternal rapprochement of Chile.

In that communication, with the purpose of avoiding errors or elapses inherent in the faultiness of memory and giving to my Government a concrete basis for deliberations, your excellency has the goodness to reproduce the five fundamental points of the project stated verbally in our first interview, considering them as a proposition one and indivisible.

These points, including that relative to the still pending plebiscite which, in observance of the treaty of Ancon, should have been held in 1894, contemplate adjustments of a commercial character, with exemptions of customs in favor of certain products of each of the two Republics which are consumed in the other; development of the merchant marine and the establishment of a line of steamers; construction of a railroad which shall unite the capitals of Lima and Santiago; and the increase of the indemnity payable by the country which shall acquire definite sovereignty in the territories of Tacna and Arica, which amount, not specified in our conference, your excellency now fixes between two and three million pounds sterling.

The undersigned ventures to observe that the response transmitted to which your excellency alludes confines itself exclusively to the suggestion of possible direct arrangements; whereas in that which concerns said territories, the Government of Peru has preferred always, and continues to prefer, the strict observance of that pact.

It is not, then, because there has been any vagueness in your excellency's clear exposition, or insufficient perspicacity in its perception, that the chancellery of Peru has laid aside that series of heterogeneous agreements, which I duly transmitted as your excellency formulates them, but because, by reason of the judgment of which I am the expounder, it was thought best to take up at once the solution of the plebiscite problem, avoiding complications.

The invitation of your distinguished predecessor, Mr. Luis Antonio Vergara, for the renewal of diplomatic relations in order that there might be procured "an agreement based on the interests and conveniences of both Republics" does not lay upon Peru the direct arrangement nor exempt Chile from the formality of a plebiscite.

After the agreement of the Chilean Chamber of Deputies, which, on returning in 1901 the Billinghurst-Latorre Protocol already approved by the Senate, recommended solely to the executive power "new diplomatic proceedings for the fulfillment of the third clause of the treaty of Ancon;" after hearing the declarations of His Excellency President Mott at the time of receiving my credentials; and above all, in view of said pact, with the force of international law, having stipulated solely and exclusively the said plebiscite, I am loth to believe, Mr. Minister, that your excellency attributes force and restrictive power to those words of mere desire in the same communication in which, among other topics, figures that of the plebiscite protocol.

The plebiscite, being entirely of a political character, has no relation with commerce, with merchant marine or steamship lines, with railways, or even with an indemnity.

These points, in themselves unconnected and independent of the treaty of Ancon, can be negotiated apart, and will receive special attention from my Government after the execution of the plebiscite protocol; that is, when there can be eliminated from the relations of Peru and Chile the problem of Tacna and Arica, whose subsistence, by being referred to the fulfillment of a solemn pact, is not susceptible of union in the celebration of other treaties.

With identical judgment, in 1893, when the plenipotentiary of Chile, Mr. Vial Solar, received proposals somewhat analagous with the present ones of your excellency, he responded:

The very nature and importance of this matter counsel, in the judgment of my Government, that it shall not be treated out of its natural field, or be complicated with a negotiation of so distinct a character as is that which relates to the definite nationality of the counties of Tacna and Arica.

My Government, in consequence, will always gladly accept whatever indication manifested by your excellency which has for its object the opening of negotiations for the establishment of a system of reciprocal commercial exemptions, and will improve every occasion for initiating, on its part, steps to that effect before the great Government of Peru; but it considers at the same time that there is no reason for treating this matter in connection with questions related to the definite possession of the counties of Tacna and Arica.

On solemn occasion I had the honor of setting forth that, in spite of the time elapsed, in said districts there exists and is transmitted,

as strong as in the epochs of sacrifice and glory, the sentiment of nationality, to whose ardor corresponds that of the other sections of the Peruvian fatherland.

While such a situation lasts, it is inevitable that there will exist the hindrance to entire cordiality, whether or not there be treaties in another sense, and being what they may the individual sympathies born under the ardor of the missions of peace.

When the plebiscite has been consummated, there is no occasion to fear that the country deprived of its expectations will be ill disposed to reestablish the friendship of other times, because the correct suffrage alone is responsible for the popular grouping which emanates from it and not the assuming Republic.

Far from maintaining it, ill feeling would disappear with the cause of the unhappy relations between our respective countries, and the country not favored by the plebiscite could not do less than resign itself to the consequences of what was deliberately stipulated, with all the more reasons, inasmuch as statesmen are guided not only by patriotic sentiment but principally by traditional national interests in so far as they do not trample upon the rights of others.

It is for considerations such as these, Mr. Minister, that on becoming acquainted with the plan of your excellency, I expressed in our first interview, as your excellency is so good as to recall, that for my Government the question of the plebiscite is of such importance that before it all others appear of second rank, adding that before asking instructions for the discussion of those annexed agreements I considered it indispensable that we put ourselves in accord in regard to the essential, or to the formalities which would guarantee the freedom of suffrage and the faithful scrutiny of votes.

Your excellency reproducing by writing your verbal exposition, I can only repeat the answer, in spite of the keenest desires to accede to your wishes, and I beseech your excellency that you be reconciled to settling later such formalities concerning the other points, whose consideration for the present I lay aside.

I ought to except, nevertheless, the reference to the amount of the indemnity which the country acquiring definite sovereignty in the territories shall give to the other, an amount which, in place of 10,000,000 soles, your excellency would raise to two or three million pounds sterling, or double or triple the sum laid down in the treaty of Ancon.

In this respect, it becomes me to make to your excellency a fundamental observation. The steps which my Government has authorized me to place before your excellency have for their object the fulfillment, not the modification, of Article III of the treaty of peace of October 20, 1883. In such sense I have asked the negotiation of the protocol, which ought, according to said article, to establish the form of the plebiscite and the terms and periods on which there should be paid the ten millions by the country favored by the plebiscite. To suppose an increase of the amount of the indemnity fixed by the treaty is to alter it, breaking the unity and correlation which exist between all its clauses and making more onerous for Peru the execution of the only stipulation pending after Chile has improved all her other advantages.

As I had the honor of declaring to your excellency, my Government would consent to a variation from the dispositions of the pact

of Ancon only to insure the immediate and definite reincorporation of the Peruvian Provinces of Tacna and Arica into the national territory.

Peru has confidence that the plebiscite would result favorably to her if carried out according to the legal precepts governing such institutions, and I believe, if your excellency will excuse my frankness, that there also exists in Chile concerning this result the conviction already revealed by some of her conspicuous statesmen, who confess the futility of almost a quarter of a century of arduous work in "Chilenization." If it were not so, not many of your excellency's predecessors would have postponed the procedure by interposing unacceptable conditions, and neither would your excellency have spontaneously proposed such increase in indemnity.

The country which has confidence in its triumph is not interested in a pecuniary standard greater than that duly agreed upon.

That unexplained quantity would be considered as a new sacrifice imposed to-day by a war which ended 25 years before, or as a spur to representatives in the plebiscite protocol for paving the way to concessions which would be an abandonment of their rights; or to a fraudulent sale of Tacna and Arica, with the disgrace of ignoring natives without whose agreement territorial dismemberment is unlawful, and contrary to the unanimous aspirations of public sentiment in Peru.

Such possible hypotheses being erroneous, and my Government not discerning any cause whatever for the modification of the treaty originating these negotiations, I must in its name declare that the said proposal is not accepted.

As to the agreement on the said protocol, I must at least pause with the disinterestedness which your excellency is good enough to acknowledge, in the examination of the three points referring to a simulated cession, direction or presidency of the plebiscite, and voters, which your excellency combines into one.

Your excellency assumes that, according to modern precedents, the plebiscite incorporated in the History of International Law constitutes a simulated transfer.

That point, argued verbally by your excellency, is the most recent in the many conferences originated by the third clause of the treaty of Ancon.

In ancient legislation, an essential and characteristic element of the plebiscite consisted of the popular will, as an expression of sovereignty.

In the light of the principle of liberty, the French Revolution of 1789 condemned conquest imposed by arms and reestablished that democratic practice as the only justifiable basis for changes in the existence of States.

Thus brought into the international field, plebiscites, whether in favor of France as the one held in Avignon in 1791, or in favor of Italian unity as in 1848, and all the rest, invariably invoke as a fundamental and legal title the consultation of the people.

In practice many times it has been brought into ridicule nor has the vote been allowed to escape the effect of brutal coercion and fraudulent manipulation. Hence the reiterated triumph of the annexor.

But compulsion is not a legal factor. Rather it is an annulling cause.

The historical precedents in which it has been exercised demonstrate that, with the apparent object of obtaining success by preparation beforehand, there have been abuses, such as exist sometimes in local elections. But local elections are not called to legitimize the recorded abuses of internal politics, neither can it be deduced from plebiscites that in the sphere of public law they have been invalidated to be converted into the diametrically opposite concept of conquest; even though this may seem to be the case in all the documents mentioning the popular will as a condition of transfer.

In article 2 of said treaty of Ancón, Peru ceded to Chile perpetually and unconditionally the Province of Tarapaca.

As regards Tacna and Arica, article 3 stipulates that after the expiration of 10 years of Chilean administration a plebiscite will decide, by popular vote, whether the territory of the Provinces referred to shall remain definitely under the dominion and sovereignty of Chile or shall continue being a part of Peruvian territory.

If the negotiators of Ancón had imposed the same fate on the populations of Tacna and Arica as on Tarapaca, they would not have agreed on a popular vote for them while omitting it for Tarapaca.

Then it was not to simulate respect for the principle of liberty proclaimed by the French Revolution that Chile bound herself, pledging her national good faith, to the plebiscite of Tacna and Arica, if one gives the words their only clear acceptation.

From the time of the reestablishment of this institution by the National Assembly, the more or less correct expression of the popular will on behalf of annexation has shown itself most often with the absolute setting aside of the sovereign repudiated, by the initiative of insurrectionary governments or of the belligerent occupant.

Such cases do not serve as precedents for the two-sided pact of Ancón.

The nation granting the cession has not stipulated the plebiscite except on four occasions:

In the treaty of Turin, of March, 1860, between Sardinia and France, referring to Nice and Savoy.

In that of Prague of August, 1866, between Prussia and Austria, referring to the population of the northern districts of Schleswig.

In the said treaty of Prague, completed at Vienna the following day between Austria and France, and later in October of the same year, between Austria and Italy, referring to the Lombard-Venetian Kingdom.

And in that of Paris, of August, 1877, between Sweden and France, referring to the return of the island of St. Bartholomew.

In the treaty of Turin, before submitting it to the will of the people, the King of Sardinia declared that "he consented to the reunion of Savoy and the union of Nice with France and *renounces for himself and his descendants and successors in favor of His Majesty the Emperor of the French his rights and titles over said territory.*

In the treaty of Prague the Emperor of Austria also *renounced in favor of Prussia* his sovereignty to the north of Schleswig the plebiscite arranged for in article 5, which in 1878 the contracting powers abrogated, forecasting in fact that the outcome of the vote of

the natives would be in favor of neither cedent nor cessionaire, but for reincorporation into Denmark.

In the treaty of Vienna, "under condition of the consent of the population after they have been duly consulted," established by Napoleon III, who had accepted the cession to transfer it to Italy as provided in the treaty of Prague, the same Austrian Emperor who ceded it "*consents to the reunion of the Lombard-Venetian Kingdom to the Kingdom of Italy.*"

Finally, in the treaty of Paris, also with a reservation concerning the consent of the population, "the King of Sweden and Norway *returned to France* the island of St. Bartholomew and *renounces in consequences for himself and his descendants and successors* his rights and titles over said colony."

In the treaty of Ancon, Peru has not renounced, as the sovereign in those mentioned, her territories of Tacna and Arica.

On the contrary she has made very clear her earnest desire not to suffer other mutilation, since she not only depends for "the form in which the plebiscite shall take place" on "a special protocol which would be considered as an integral part of the treaty," but is bound, the same as the Government of Chile, to the delivery of 10,000,000 soles in case the result is favorable to her, an obligation in proof of her expectations which is not found in any of the other four pacts recorded.

The populations of Nice and Savoy and St. Bartholomew and also those of Venice were more united to France and Italy, respectively, than to Sardinia, Sweden, and Austria, by more or less suggestive historic ties. The people of Tacna and Arica are in the main Peruvian; over these Provinces Chile could never have been influential or pretended to any right whatever.

The plebiscite in Nice and Savoy was held in April, 1860; in Venice, October, 1866; and in St. Bartholomew, in the last days of September and the first of October, 1877; or within a few weeks of the treaties of March, 1860; October, 1866; and August, 1877, which respectively stipulated them. That of Tacna and Arica had the necessary period of 10 years; it was not considered of the essence of the pact, as would have occurred in 1883 if in truth Chile had imposed and Peru had resigned herself to accepting it as a form, in consequence of the war, of acquiring those territories at all hazards.

There exists, then, no parity between the treaty of Ancon and those of Europe erroneously cited as antecedents.

Then the clause relative to a decision of the popular will had not for its negotiators the force of a dead letter.

Previous negotiations ratify that assertion.

Such are those of October, 1880, on board the American corvette *Lackawanna*, in which the Chilean plenipotentiaries assumed, among other demands of minor importance, the cession of the territories south of the Pass of Camarones the payment of 20,000,000 pesos by Peru and Bolivia together and "the *retention* of Moquegua. Tacna, and Arica until the obligations to which the previous conditions refer shall have been fulfilled, Peru binding herself moreover not to mount cannon at the port of Arica *when it shall be delivered*, or at any time." Such also are the negotiations of the Balmaceda-Prescott protocol, signed February 11, 1882, in Viña del Mar, in which the minister of foreign relations pointed out as a basis for peace (not

concurred in by the United States, which had offered its good offices) the same *cession* to the south of Camarones, the payment of 20,000,000 pesos and *the occupation of Tacna and Arica for 10 years* or the longest time "Peru could fix in the treaty," with the obligation that if, on the expiration of the period stipulated, such sum should not be paid "the territory of Tacna and Arica would remain ceded '*ipso facto*'" and that "if Arica should return to the dominion of Peru, she would remain unarmed forever." The same is true of the negotiations in which Mr. Logan took part, in which, according to the memorandum of October 18, 1883, the Chilean chancellor suggested the idea, disregarded by President Calderon, of carrying out a plebiscite to determine whether Chile was "disposed to pay 10,000,000 pesos for the territory, *if the plebiscite delivered it to Chile*, and expected to receive, in turn, 10,000,000 pesos *if the plebiscite accorded the territory to Peru*, and accepted arbitration to establish whether or not Chile had the right to purchase the territory of Tacna and Arica or had "to occupy said territory in a military sense for the period of 15 years, being obliged to evacuate it at the end of that period."

These negotiations bring into relief the fact that Peru resisted always the cession, in whatever form, of the territory of Tacna and Arica, and that for the same reason on accepting the decision by suffrage in the treaty of 1883, she contemplated the legal plebiscite according to the uniform criterion of treaty makers, and not the prostitution of the popular will which at any time excesses may profane. For this reason both Republics foresaw, as was foreseen in the previous projects, the difficulty that would arise when these territories should be reincorporated into Peru.

Also the same assertion is corroborated, not only by the declarations to Mr. Larrabure, in 1884, of the Chilean negotiator of that pact, Mr. Jovino Novoa, but, laying aside all those of extemporaneous and unofficial character by Mr. Luis Aldunate, by those laid down in 1883 (the year of the treaty) in the memorial of that functionary in his capacity as minister of foreign relations.

In order not to have a disguised cession, on August 10, 1892—before March 28, 1894, on which date the decennial expired—Mr. Larrabure invited the plenipotentiary, Mr. Vial Solar, to the elaboration of the protocol relating to the plebiscite; and the conferences, principally verbal, continued during an extended period of years, now verbally, now written, the same in Lima with the agents of Chile as in Santiago with the many statesmen who succeeded each other in the Moneda, without anyone ever disclosing that such proceedings were incongruous.

Far from this, foreseeing the possible triumph of Peru in the plebiscite, Mr. Lira asked a guarantee for the payment of the indemnity; and the Government of Chile maintained its proposal, always opposed, for the increase on her behalf of some millions above the 10 indicated, in case, the fact having been modified, a definite cession should be agreed upon.

In the first clause of the treaty between Chile and Bolivia of May 18, 1895, on the transfer of territory, Chile was obliged to cede to Bolivia the Provinces of Tacna and Arica "*if she should acquire them as a result of the plebiscite* which should take place in conformity with the treaty of Ancon;" in the third clause "it is prom-

ised to *employ all her efforts in obtaining a definite property*" in said territories; and in the fourth clause there is a subsidiary compromise on "*not being able to obtain in the plebiscite or by direct arrangements the definite sovereignty of the zone in which are located the cities of Tacna and Arica.*"

It is obvious that on having agreed concerning the abandonment, Chile did not contemplate, as in the pact of 1895, or in the additional and explanatory protocols of December 9 of the same year and of April 30, 1896, the possibility of suffrage in favor of Peru.

For this reason, ratifying previous declarations, the minister of foreign relations of Chile set forth, in his memorial of 1894, that the treaty of October 20 "had deferred to a later pact, consecrated by a solemn agreement, and *of results absolutely uncertain*, the adjudication of dominion over those territories."

In his turn, in his message of 1900, President Errazuriz said that "in the treaty of peace the definite nationality of Tacna and Arica remains undecided."

For this reason, also, Mr. Errazuriz respected the international compromise in the Billingham-Latorre protocol, which the Senate sanctioned; and after summarily approving of it, the Chamber of Deputies left it in suspense, not because that document rescinded any agreement, but so that the Executive Power might initiate new diplomatic proceedings to fulfill the third clause of the pact which stipulates the plebiscite by popular vote.

The deduction concerning the simulated cession or conquest of the Provinces of Tacna and Arica—drawn, not from the text or the spirit of that treaty, but from inapplicable European plebiscites—ought, then, to be dismissed completely.

II.

Nor is it exact, Mr. Minister, that to the Government of your excellency should belong exclusively the designation of the personnel which should preside over the plebiscite, whether in the enrollment of electors, the reception of the votes, or the rules of the election.

What is the title to the sovereignty which to-day Chile alleges in the Provinces of Tacna and Arica?

It certainly is not that of occupation, which the law authorizes only in respect to the *res nullius*.

Neither is it that of the bloody military advance during the war to which the treaty of 1883 put an end, in whose fulfillment the army evacuated the invaded region, with two exceptions, one being Tarapacá and the other the Provinces mentioned.

On that pact alone depends the title invoked.

Its text establishes in the third clause that the territory of Tacna and Arica "shall remain in the possession of Chile, and subject to Chilean laws and authorities, during the term of 10 years, to be reckoned from the ratification of the present treaty of peace."

The exchange of ratifications was effected March 28, 1884.

The decennial ended, in consequence, on the same date in 1894, and Peru recovered legally her entire sovereignty, in part suspended.

For that reason the minister of foreign relations, Mr. Gimenez, recalled in June, 1893, to the Chilean plenipotentiary the opportunity

for the return of the Provinces temporarily occupied; then, on encountering resistance, he proposed that the solution of the case should be submitted to the judgment of a friendly government, and later, on the eve of the expiration of the period, the Peruvian plenipotentiary in Santiago, Mr. Ribeyro, presented again the fact that the occupation of those Provinces did not belong to Chile after March 28, 1894.

That affirmation is perfectly in accord with the spirit and the letter of the treaty.

The third clause adds a continuation of the phrase written before:

This period (that of 10 years) *having expired*, a plebiscite will decide by popular vote.

It is, then, when the decennial has expired—not within it—that the plebiscite should have been held.

It is natural, in fact, that the people should be left free from the compulsion which authorities animated by a mistaken zeal assume to exercise in favor of their own nationality among those to whom, during a decennial interval, they ought to have made efforts to render more pleasing the administrative régime of the occupying country.

With the termination of the period ends that of the conventional law for whose enforcement stipulation was made.

Finally, there has ceased, for this reason, the precarious sovereignty of Chile in the territory of Tacna and Arica.

Possession for a period categorically defined is not prolonged or renewed indefinitely solely by the free will of the party which enjoys it against the protests of the other contracting party.

With such motive, doubtless, the distinguished predecessor of your excellency, Mariano Sanchez Fontecilla, proposed to Mr. Ribeyro, among other points, the following:

There is postponed until March 28, 1898, the period of 10 years accorded in Article III of the treaty of Ancon.

The postponement not being granted, the Government of your excellency ought, then, to return the Peruvian territory, thus respecting the aphorisms of universal law, according to which, at the expiration of a term of temporary tenancy, the direct owner of a thing recovers entire his dominion.

It is only with the object of arriving at an end and avoiding distrust that, in consequence of the refusal of Chile, Mr. Gimenez conceived, as a recourse of transaction, the delivery of the Provinces to a third power designated by common accord, in order that under its auspices may be verified the actuation and according to its results the republic chosen will receive the Provinces without delay.

If so equitable a proposal should be made practicable, and there should disappear with possession the advantages of propaganda which make the convocation of a plebiscite now valueless, the obstacles would have been easily solved and there would remain no ulterior causes of discontent.

Neither do the diplomatic precedents to which your excellency alludes show that plebiscites have been carried out under the exclusive direction of the State in whose advantage the suffrage resulted.

The plebiscites of 1860 in favor of France were effectuated, according to official documents, under the *presidency of the authorities named by the ceding King of Sardinia*.

In the proclamation of that Monarch to the populations of Savoy and Nice he told them, in effect:

In order that nothing may impede the free manifestation of your votes, I separate the principal functionaries of the administrative order which does not belong to your country and replace them at once by various of your citizens who enjoy general esteem and consideration.

Said new functionaries expedited, each one in his own locality, the regulations delivered certain municipal bodies who should form the list of citizens with right to vote, pass upon complaints, etc.

The plebiscite of 1866 in favor of Italy was carried out in conformity with the *regulation of the annexing sovereignty* but under the presidency of municipalities composed exclusively of natives.

The French Deputy, Gen. Lebouef, received, in fact, Venice, and delivered it to a body of notables presided over by Count Michiel. Victor Emanuel then regulated the proceeding, arranging that the municipal representatives of the Provinces liberated from Austrian occupation should dictate "all convenient dispositions in order that the manifestation of universal suffrage should be free and solemn."

The plebiscite of 1877, with result favorable to France, was effected under the *presidency of the ceding King* of Sweden, who ordered the governor of the island of St. Bartholomew to "make suitable arrangements for the voting," establishing the rules which would have to be followed.

The only conformity of these precedents is in the *modus operandi* before natives of the locality subject to the plebiscite; and if they were imitated there would intervene as functionaries only the people of Tacna and Arica.

But in that which concerns the presidency, the examples are found to lack conformity.

The renunciation being absolute and explicit for the ceding sovereignty, his descendants and successors (an essential point contrary to the treaty of Ancon), it would have been conceivable that it would leave the cessionaire in complete liberty. Nevertheless, in two cases out of three, it is the ceding who assumes always, according to said official documents, the high direction of the plebiscite.

I have the honor to assert that the continuation of Chilean authorities in the territories of Tacna and Arica, after March 28, 1894, is patently illegal.

From what is unlawful no rights emanate.

Then there can not exist what Chile never had: the right of sovereignty to preside over the plebiscite, much less to direct it without control, enrolling the electors, receiving the votes for or against her aspirations, scrutinizing the elections, and announcing their result.

Your excellency says that "it does not appear suitable" that the Chilean authorities "on forming electoral boards, should give representation on them to citizens of Peruvian and other nationalities."

Citizens of other nationalities could not be other than impartial if designated by our respective Governments, of common accord, to preside over the elections.

My Government, to which in truth belongs the exercise of sovereignty in the captured Provinces, and which does not invoke it to pretend to a simultaneous rôle of judge and party, does not admit, Mr. Minister, even in the form of a gracious concession, the subordinate actuation, a humiliation, which, considering the friendly and

conciliating spirit of our negotiations, the undersigned would have wished that your excellency might have refrained from mentioning.

Although the sincere promises of impartiality which your excellency has the goodness to reiterate do not inspire doubts, it suffices to remind you that expectations concerning Tacna and Arica exist not only in Chile but in Peru; for the same reason, according to the fundamental precepts of justice, the only logical deductions from this right, equal in principle, is that the two Republics shall have identical intervention and identical positive assurances, so that the plebiscite may express, with the testimony of both, the verdict of the people.

This is the basis accorded in the Billinghurst-Latorre protocol.

III.

Permit me now, your excellency, to show that there belongs only to the natives the right of suffrage.

While they are not nationalized, foreigners retain their legal status as such. In order not to lose their own national ties, or to acquire those of the foreign country, they are deprived of political rights in the place of their domicile; and on a transfer of territory, without binding them by any declaration whatever, their personal status remains the same.

The plebiscite vote, in the present case, is of a very special character. Not only does it make effective the participation of the citizen in the management of public affairs, but particularly in the selection of sovereignty determined for the territory. Its political quality is sufficient to exclude from it all foreigners, without exception, since constitutional knowledge dogmatically deprives them everywhere of this right.

If suffrage is of such a nature that its exercise can not be conceded to the nationals of the countries interested, still less is it possible to pretend that it may be bestowed as a privilege upon foreigners. Tacna and Arica are Peruvian Provinces. Notwithstanding the fact that the citizens of Peru, not born in Tacna and Arica, would be denied the vote, this would belong to the citizens or subjects of other nations; and thus those who might be supposed to have no interest in the result of the plebiscite would be in a better political situation than their compatriots. The intelligent judgment of your excellency relieves me from elaborating upon the absurdity of such a conclusion.

If the plebiscite is an exclusive right of sovereignty, and its development does not affect the foreign population, it is obvious that nothing will justify the intrusion of those guests in that act of such transcendental effects only for the political group of which they form no part.

To concede them the vote is to attribute to them joint dominion, equally with the citizens of Peru, over the territory which temporarily they have inhabited; mastery over those who temporarily offer them hospitality, to the extent of deciding upon their future, wounding the sacred love of country; it is to authorize them, influencing thus in the dispossession and denationalization of the citizens, to abandon neutrality, which in every international contention the most trivial rules of right impose upon them.

Dr. Alexander Alvarez, technical consultant of the ministry now in charge of your excellency, said in one of his publications, referring to the foreigners domiciled in Tacna and Arica:

It is a fundamental principle of civil and constitutional law of all countries that in a foreign country the foreigner has no political right; and the suffrage as to which of the two contending countries a portion of territory which is occupied in a military sense by one should belong is the highest manifestation of a political right from the international point of view. Aside from this reason, which is fundamental, it may even be asked by what motive the foreigners would have the right to vote on a matter of annexation from one country to another. Because they have possessions in those territories? That interest only gives them the right to ask that their belongings be respected, and nothing more. And from the moment in which their possessions are respected, they could claim no right to take part in the suffrage to decide a question to which they, as foreigners, have been and ought to remain strangers.

The quality of being Chilean is not so exceptional as to justify the vote.

In his memorial to the Congress of 1883, the root of the pact of Ancon, the well-known statesman Luis Aldunate, after expounding the influence of the transitory administration of Chile, added:

If all these causes should induce the inhabitants of Tacna and Arica to *decide for Chilean nationality*, in that hypothesis, which ought to be considered perhaps the most probable, the *assimilation* of our *new nationals* would be accomplished beforehand without violence or abrupt breaks and without exacting more than a simple rectification in the geographical map of Chile.

Those concepts of the minister of foreign relations which he had in Lima as delegate of the Government of Santiago, with the object of inspiring arrangements for peace, showed that the voters induced to "decide for Chilean nationality," the "new nationals," were not the sons of the occupying Republic, but the Peruvians whose "assimilation" was presumed as a consequence of good administrative regimen in the retained provinces.

The Chilean citizens resident in these Provinces are as foreign as the rest.

Without right in the Peruvian sovereignty, without their personal status being affected by the result of the plebiscite, the circumstance of importing their vote in behalf of Chile, not only a violation of neutrality but an effective aid in the act of conquest, makes even more evident their disqualification.

The third clause of the treaty establishes that on the expiration of the period of 10 years "a plebiscite will decide by popular vote." whether the territory of the Provinces of Tacna and Arica shall remain definitely under the dominion and sovereignty of Chile or whether it will continue being part of the Peruvian territory.

Your excellency is good enough to suppose that the "popular will" required is that of all the inhabitants, including that of the foreigners who have rooted their interests and established their families in the locality to whose prosperity they contribute with persevering and fruitful labor.

If the deduction from this last observation were exact, this would be sufficient for the bestowal of political rights upon them.

At present such a theory would infringe upon that of Chilean legislation which forbids them participation even in municipal affairs.

In the foreign resident, instability may be presumed; the desire to return to the homeland whose ties have not been broken, with the new family and the new fortune acquired while away.

For this reason it is conceivable that in him the conflict of a plebiscite would produce an interest only in his own tranquillity at whatever cost.

Who desires truly, whatever may be the place of his residence, in place of peace, not present good but that of the future of the region, are the natives themselves who, in its defense, by duty and patriotism, sacrifice homes, family, and life.

Article 1 of the constitution of Chile declares that its Government is "popular."

It is thus designated inasmuch as its elections originate not from the union of German, English, etc., inhabitants, but of the citizens, that is, of the Chilean people.

Amplifying the statement, the text makes exact the scope of the designation in the field of law.

There is no reason for variation in international law; the more is this true in reference to the plebiscite, inasmuch as the institution is founded, I must repeat with apologies, on sovereignty; that is to say, on the people who exclusively constitute the nation.

Thus the treaty makers teach.

And also the diplomatic antecedents invoked by your excellency ratify it.

In the treaty of Turin, it is stipulated that for the transfer shall be taken into account "the will of the people." The regulation for the plebiscite in Nice is set forth in article 4: "There shall be admitted to vote all those *citizens* who are at least 21 years of age, *who belong by birth or origin to the earldom of Nice*; and for the action in Savoy it sets forth, also in article 4: "There shall be admitted to vote all the citizens who are at least 21 years of age *born in Savoy or out of Savoy, of Savoyan parents who inhabit the district*."

In the treaty of Vienna also is stipulated the transfer "under condition of the *consent of the people duly consulted*." The regulation for the plebiscite "in the Italian Provinces liberated by the Austrian occupation" sets forth in article 5: "On the days designated for the voting *all Italians* of said Provinces who have completed 21 years."

In the treaty of Paris, likewise, the transfer is stipulated "with the express condition of the consent of the people of St. Bartholomew," and the King of Sweden set forth: "Every man of the population of the island, in the enjoyment of civil rights and having attained his majority, can take part in the plebiscite." An explanation was believed necessary, and it was given as follows by the minister of foreign affairs of the ceding monarch: "The sense is, *naturally*, that only Swedish subjects may vote."

In all those regulations, in accordance with the treaties which pledged the consent of the peoples or populations, there is mentioned always the citizens, never foreigners or nationals of the would-be annexor.

The analogous formula of "popular vote" employed in the treaty of Ancon could not, then, Mr. Minister, be interpreted in a contrary sense.

While deploring the necessity of so doing, I have abused the kind attention of your excellency.

To me it has seemed necessary to do it, in order to place in relief the fact that the allegations of the Government of Peru in this matter are not inconsiderate and arbitrary, and to the end that, such conviction having reached the mind of your most excellent President and of your excellency, your rectitude and energy may pave the way for agreement. These induce me now to take up next some opinions expressed in the important communication to which I reply.

Your excellency says to the undersigned:

Your excellency knows well that the treaty of 1883, on leaving to be determined by plebiscite the definite nationality of Tacna and Arica, did not express what was to be understood by said plebiscite, nor did it fix the form and manner of its execution.

Naturally such omissions can not be attributed to forgetfulness on the part of the negotiators, but to an implicit recognition that the procedure agreed upon could not be other than that of the plebiscites in the History of International Law.

In previous paragraphs there has been defined the spirit and juridical effects of the plebiscite. I now content myself with observing that the historical procedure, to which your excellency alludes, shows itself in two aspects.

One of these is that of the previous regulation of the *modus operandi*, set forth by the authority in Nice, in Savoy, in the Italian Provinces, and in the island of St. Bartholomew, as I have shown in detail.

The other is, sometimes, at the root of the pact with the cedent sovereignty, now without interest in the population or populations which he has explicitly and *absolutely abandoned*, manifesting itself in brutal coercion and fraudulent maneuvers, in order to obtain, at whatever hazard, the burlesque form of transfer.

I hasten to recognize, Mr. Minister, that the Government of Chile does not actuate under the latter aspect which would destroy the prestige of the administration of his excellency, Mr. Montt.

Historical precedents center, then, around the regulatory aspect, also sometimes observed, of plebiscites, and it is reasonable to suppose that it is this aspect which the negotiators of the treaty of Ancon held in view.

The words of the worthy predecessor of your excellency, Mr. Luis Aldunate, in his memorial of the same year, support such an opinion:

If the result of the plebiscite should return the territorial region of Tacna and Arica to the dominion of Peru, Chile will fulfill her loyal and honorable policy by respecting the decision of those peoples.

I take pleasure in declaring, Mr. Minister, that from this point of view, which in truth resolves the principal difficulties, I accept, with small differences, the judgment of your excellency.

As your excellency has worthily emphasized, we find ourselves in perfect accord in the primary duty of putting an end to a situation which has for so long disturbed the harmony of our times.

For that and previous considerations, I permit myself to invite your excellency to continue the conferences until we obtain accord, adapting to the disputed clauses of the Billinghurst-Latorre protocol, which has served us as a basis, the positive precepts of the diplomatic antecedents, in accordance with the principles of law and justice.

These principles, Mr. Minister, are those which, among collective bodies, as between men, silence immoderate suggestions of the conveniences, strengthen with stable ties the sisterhood of the States, and at the same time promote, in harmonious concert, the aggrandizement without blemish of each one of them, satisfying thus the noble demands of patriotism and those no less elevated of love of humanity and civilization.

I am sure that, understanding it thus, the great Government of your excellency will be persuaded to render tribute to the spirit of Pan-American solidarity which to-day dominates all the nations of our continent for the just arrangement of the differences which separate them.

I am very pleased to repeat to your excellency the assurances of my most distinguished consideration.

G. A. SEOANE.

To His Excellency Hon. FEDERICO PUGA BORNE,
Minister of Foreign Relations of Chile.

OBSERVATIONS ON THE NOTE OF HIS EXCELLENCY, MR. SEOANE.

The treaty of October 20, 1883, between Chile and Peru, known as the pact of Ancon, put an end to the war between the two countries.

In conformity with the terms of the second article of that agreement, Peru ceded to Chile, perpetually and unconditionally, the Province of Tarapacá, and by article 3 the Provinces of Tacna and Arica are subject to our sovereignty and, consequently, to our legislation and authority, until a plebiscite, which should be celebrated 10 years after the ratification of the treaty, should decide with which of the nations they would be indefinitely incorporated. The country to which the sovereignty of those territories belonged would pay to the other 10,000,000 pesos in Chilean silver money or the equivalent in Peruvian soles.

A second clause of the article adds that a special protocol would establish the form in which the plebiscite would be celebrated and the terms and periods for the payment of the 10,000,000 of pesos.

A little before the expiration of those 10 years the chancelleries of both countries opened negotiations to reach an agreement on the plebiscite, without attaining that result.

In 1901 Peru withdrew her diplomatic representation in Chile and at the same time directed a circular to the foreign chancelleries, in which the charge was made against our Government of refusing to comply with the pact of Ancon.

The chancellery of Santiago which, in the course of its negotiations, sought, in the highest spirit of conciliation, a friendly agreement with Peru, invited her in a note dated March 15, 1905, to renew diplomatic relations. To avoid having the negotiations which might be initiated become a reproduction of those which had been futilely carried on up to that time, the invitation was made with the object of procuring an agreement based on the interests and convenience of both Republics, adding that "in this field, which is that of reality in

the life of the peoples, the agreement between Chile and Peru would be immediate, absolute, and lasting."

The Government of Peru accepted the invitation and accredited a minister plenipotentiary in Santiago.

According to the result of the notes exchanged February 18, and March 15, 1905, between the two chancelleries, and of March 26 and May 8, 1908, between our minister of foreign relations and the representative of Peru, his excellency, Mr. Seoane, the controversy has been based on the following points on the part of Chile:

1. The negotiators of the pact of Ancon, on stipulating that Tacna and Arica should remain under the sovereignty of Chile, pending a plebiscite to determine later the definite nationality of those territories, gave to this proceeding the value and force which diplomatic history and international practice pointed out to them. As statesmen which they were, they took the plebiscite formula, not in its theoretical or juridical scope, but as the most adequate procedure for the difficult circumstances which beset the Government of Peru; that is to say, a practical and honorable form for facilitating the annexation of those territories, making it acceptable to the popular sentiment of the country conquered in the contest.

2. The Government of Chile, in its desire to reach a friendly solution with Peru, has manifested, in the whole course of the negotiations, its will not to be extreme in the exercise of the rights which in reality the treaty of Ancon confers upon it provided always that on its part the Government of Peru shall manifest itself disposed to an arrangement which shall assure a solid and durable peace and reestablish concord between the two peoples.

3. In the judgment of Chile, the best means of securing these results consists in binding agreements which shall take into consideration mutual political and economic interests. One of these agreements is the celebration of the plebiscite on a more equitable basis which she proposes, tending to assume universality of suffrage as well as impartiality of scrutiny, and capable, therefore, of giving triumph to Peru, if thus the popular vote should decide.

On her part Peru alleges:

1. That the plebiscites which history registers have not the force which the Government of Chile assumes;

2. That, supposing they did possess this force, the plebiscite stipulated in the pact of Ancon is of a very different nature from those which have been agreed upon up to the present; and that, in consequence, it should be complied with rigorously. Therefore Peru intends that the plebiscite shall not be presided over by Chile, and that only the original Peruvian inhabitants of Tacna and Arica shall have the right to vote. These propositions are equivalent on the whole to assuming that the operation of a mere form which shall assure beforehand the victory to Peru is binding.

3. That since 1894, the date on which the plebiscite should have been celebrated, our country ceased to exercise sovereignty over Tacna and Arica, converting itself into an unjust retainer of that territory.

Let us examine each of these points, which now constitute the basis of the discussion between Chile and Peru, as it appears from the communications quoted.

I.

Our minister of foreign relations, Mr. Luis A. Vergara, stated in his note of March 15, 1905, directed to the Government of Peru, the following:

All the international plebiscites held within the last two centuries have been but hypothetical measures for the purpose of sanctioning an annexation already made, as those called during the French Revolution, or to attenuate an annexation or cession already made, as those which have taken place in the nineteenth century. The result, as a natural consequence, has always been favorable to the annexing country, which never yet saw in these plebiscites any discussion of its rights but only a mere formality.

It is not difficult to demonstrate, in the light of history and with examples of recent times, the exactness of this statement.

The idea of applying the plebiscite to territorial annexations was born during the French Revolution as a consequence of the beginning of popular sovereignty, proclaimed at that time.

Understanding, however, that it was very dangerous to apply this principle in so resolute a manner to the relations of State to State, the National Convention of 1792 tried to reconcile the dogma of sovereignty and the promises of fraternity and help which the convention itself had offered to all nations, with the necessity and natural aspiration which the French people felt for enlarging their frontiers.

In the manner of effecting the conciliation, that assembly did not vacillate; to the necessities of external policy every principle, however fundamental it might be, should be subordinated.

From this cause the idea of limiting the force of the plebiscite by adopting various proceedings, according to the cases which present themselves, arose. If the region which was to be annexed desired to be united to France, the plebiscite should be taken as a mere form; and, in a contrary case, the popular will had to be subject to that of the conqueror, employing, if it were necessary, the coercion of armed force.

The annexation to the French Republic of Nice and Savoy is a notorious example of the first case. The plebiscite held after the occupation of those territories by the French Army deceived no one, neither the onlooking countries nor the interested nations themselves. According to the expression of the renowned historian Michelet, that was not in truth a conquest but a simultaneous act of fraternity in which two kindred peoples long separated, again met in the course of history, and founded one State.

The countries on the left bank of the Rhine, and above all, Belgium, are examples in the second case.

France did not hesitate to annex by arms those regions which, politically and economically, were necessary to her, resorting later to the plebiscite as an apparent form of respect to the popular will which went to render more solemn the fact of annexation.

On the left bank of the Rhine, the French commissioners charged with effecting the plebiscite went to painful extremes to falsify the popular will, and even terrified the electors who were obstinate in voting against the transfer of sovereignty.

Analagous proceedings were observed in Belgium after its occupation by the French Army.

The lesson which may be deduced from the plebiscites held during the French Revolution is, then suggestive.

The same governors who declared that there could be no acquisition of territory, above all in consequence of a war, without the consent of the inhabitants, recognized in the practice that it was impossible to apply loyally to this rule when the convenience of the conqueror exacted otherwise a doctrine which Carnot synthesized in 1793 on declaring that, in the matter of annexations, there was a principle superior to the popular will: "To prevent other people from imposing on us their law."

In 1793 the Government of France abandoned recourse to plebiscites in conquests, not having consulted since then, even as a matter of form, the will of the inhabitants of the region which she takes under her sovereignty.

The same thing occurred in the nineteenth century, under Napoleon III. Neither France nor any country submitted to popular vote the numerous annexations which during this epoch were carried into effect.

Napoleon III, who, in the interior political order, had appealed to the plebiscite to justify before the world the blow of the State in 1852, and who had always been presented as the most unselfish defender of individual rights and the most decided partisan of the principle of nationality, succeeded, by means of his preponderating influence in Europe, in having all Governments accept the institution of the plebiscite for certain cases of change of sovereignty, in which he took a more or less direct participation.

Said institution has been stipulated since then in the following cases: Unification of the Italian States; annexation of Nice and Savoy to France; annexation of the Lombard-Venetian Kingdom to Italy; of the northern part of the Duchy of Schleswig to Prussia, and the retrocession of the island of St. Bartholomew to France.

The Italian plebiscites have no practical importance from the point of view in which we are interested. They were only for the tangible attestation of the will of the citizens of free States which earnestly desire unity with Italy.

Napoleon III, who had contributed efficiently to the formation of **this** unity, asked and obtained from the King of Sardinia, in recompense for his services, the cession of Nice and Savoy to France.

In the treaty of March 24, 1860, under whose terms the cession was made, it is stipulated that the cession shall be effected without violating the popular will, and that the Government of France and Sardinia shall agree upon the best means of estimating and proving this will.

The plebiscite, which was destined to be a mere form, was carried out under the direction of the Governor of Sardinia, the country which exercised sovereignty in the territory. And what is more worthy of note: In spite of the dispositions of the pact of 1860, there was no formal agreement between the French and Sardinian Governments on the conditions of effecting the plebiscite, which were fixed by the agents of Sardinia. In Savoy they were made by the governor general of the Province of Chambery, Dupasquier, under date of April 7, who, in order to save appearances, said that these conditions had been established in accord with the French chancellery. In Nice they were by the provisional governor; and the formation of the electoral lists like the operation of the vote were regulated by recorders named by the King.

The right of suffrage was accorded only to the original inhabitants of the territory because they were nationals of the country which exercised the sovereignty in it, and because without discrepancy of opinion, they showed themselves decided partisans for annexation to France. The best proof of that is that the annexation was proclaimed by an almost unanimous vote.

The Lombard-Venetian Kingdom was ceded to Italy also under the appearance of a consultation of the popular will.

By the treaty of Vienna of October 3, 1866, which put an end to the war between Austria and Italy, Austria declared that she had ceded to France that Kingdom (Convention of Aug. 24, 1866); and that, the Emperor Napoleon III having declared in turn that he was disposed to recognize the incorporation of this territory into Italy, under condition of the consent of the population when duly consulted, the Emperor of Austria consented to the reunion to Italy of the Lombard-Venetian Kingdom. The evacuation of the ceded territory had to be made immediately after the signing of the treaty of peace and effectuated according to the decisions of the special commissioners designated for the purpose. These agreed that the cities and fortifications should be handed over to the municipalities, who would proceed to carry out the plebiscite.

These conformed, for the purposes of that act, to the regulation set forth by the King of Italy, who in reality had entered upon the exercise of sovereignty in that region.

Article 5 of the regulation conceded the right of suffrage in the Provinces liberated from Austrian occupation to all Italians resident there who were 21 years of age.

In this case, as in the former one of Nice and Savoy, the plebiscite was carried out under the authority of the country which exercised sovereignty at that time, and the vote was granted only to the nationals of the respective territory who were the better disposed to vote in favor of annexation. The consultation of the popular will was, then, pro-formula, and resulted almost unanimously in the sense of reincorporation of the Lombard-Venetian Kingdom into Italy.

The treaty of Prague of August 23, 1866, which put an end to the war between Austria and Prussia, stipulated that Austria should cede to Prussia its rights over the Duchies of Schleswig and Holstein, which both countries had won from Denmark; and added that if the inhabitants of the northern districts of Schleswig, by free suffrage, should manifest their desire to be reunited to Denmark they should be ceded to that country.

This clause was inserted out of deference to the desires of Napoleon III; but the thought that it would be fulfilled was not seriously entertained. The consultation, duly made, would have given a result favorable to the annexation to Denmark, the population in the district where the plebiscite should be held being Danish. But Bismarck declared more than once that this consultation was useless, because in case of the decision being adverse to Prussia, the military front and external security of his country would be affected, and this, in his judgment, could not in any case be dependent upon a popular vote.

On January 12, 1867, Prussia dictated the form for the incorporation into her sovereignty of the two duchies, without making the ex-

ception or condition which the treaty of Prague established in favor of the inhabitants of northern Schleswig.

By the treaty of Vienna of October 11, 1878, between Austria and Prussia, that disposition relative to the plebiscite was left without effect, it being declared that this was done "in view of the difficulties which opposed the realization of the principle established in article 5 of the treaty of Prague." Such historical incidents referring to the annexation to Prussia of Schleswig and Holstein are, by the form in which they have been produced and the importance of the countries which have taken part in these negotiations, of greater importance in international practice.

Two great powers, Prussia and Austria, established a precedent which marks the course in the attitude of nations in cases where disagreements and conflicts relative to the fulfillment of any of the clauses of a treaty solemnly signed and ratified occur. Before the harmony and general convenience of peoples, and in the presence of more effective and enduring interests, the clauses agreed to (that of the plebiscite in this case) are left without effect by common accord when their fulfillment is not easy and liable to be accompanied by unrest or outbreaks.

After the fall of Napoleon III, only once has a plebiscite been stipulated for the purpose of deciding on territorial annexation, and that had for its object, the same as in other cases, to solemnize the fact of annexation.

By the treaty of August 10, 1877, Sweden returned to France the island of St. Bartholomew, previously consulting the will of the inhabitants. By royal order of the King of Sweden to the governor of the island, dated August 17 of that year, he was charged to proceed to the celebration of the plebiscite in the form which he should determine, all inhabitants who had reached their majority and were in the enjoyment of their civil rights being able to participate in the voting. In defining their civil rights, the minister of foreign relations of Sweden in a telegram to his legation in Paris of September 5, said:

* * * It is well understood that the Swedish subjects alone can vote.

In that case, as in the previous ones, the plebiscite was arranged and effected under the exclusive authority of the country which exercised sovereignty over the territory, the right of suffrage being granted only to the citizens, in deference to the fact that they were nationals of that country and that it was known that they wished to vote in favor of annexation to France, as is shown by the circumstance that of 352 voters only one was contrary to this result.

Various important consequences may be deduced from the history of international plebiscites in the nineteenth century, all of which, contrary to those of the French Revolution, have been carried out without any violence whatever.

The first is that, when that proceeding was stipulated, it has been only a form, to justify by the appearance of a popular vote the transfer of territory agreed upon beforehand.

Another consequence is that the operation of the plebiscite, as an act of sovereignty, was effected always under the exclusive direction of the country which exercised sovereignty over the ceded territory, the Government of this country being the one which arranged by

itself alone the conditions for the celebration of the plebiscite, although the stipulation was that it should be arranged by common accord.

In order that the voting may be carried on freely and appear characterized as the popular will, the right of voting, in spite of the fact that it was stipulated that it would be granted to all the inhabitants of the region, was conceded only to the citizens who, besides being nationals of the State which gave them this right, were by their historical antecedents decided partisans in favor of the territorial transfer.

Finally, in case it is known beforehand that the plebiscite will give an unfavorable result to the country which exercises the sovereignty, the act has not been carried out, leaving then without effect, by common consent, the agreement to which they had bound themselves.

By such antecedents it is that statesmen and publicists consider the institution of the plebiscite as an accessory form, destined to save appearances, as the external ratification of the act officially agreed upon by the chancelleries.

None of the statesmen of the nineteenth century who have ruled the destinies of great nations has had the candor to confide to the chances of an unconditional plebiscite, with uncertain results, the definite sovereignty of a territory which ought to be incorporated into his country by the unescapable force of events or by political and military exigencies which nations can not always lay aside without compromising their safety and tranquility.

His excellency, Mr. Seoane, pretends that the history of plebiscites does not form precedents, because in those acts fraudulent manipulations have always been produced, causing the repeated triumph of the annexor, and that the plebiscite of free choice, such as the public law contemplates, is not invalidated.

This affirmation is inexact because in the three plebiscites held in the nineteenth century the popular will was not prostituted, the triumph of the country granting the cession being due to those to whom the right of suffrage was given.

The plebiscite of free choice, to which Mr. Seoane alludes, does not exist as an international political institution. The nations never have accepted it seriously. In the conference of London of 1864 all the great powers there represented manifested themselves opposed to it. And if, in the field of theory, the plebiscite doctrine has been sustained by some publicists, it is to-day completely abandoned.

No other institution of plebiscite is known, then, than that which diplomatic history registers, according to which in all the documents in which the popular will is mentioned as a condition of transfer of territory, it is, the cession being agreed upon beforehand, with the characteristics of an act consummated.

Even Mr. Seoane sees himself later obliged to recognize that this, in reality, is the true force of the situation.

Understanding, moreover, the true object of the plebiscites, and that his affirmations have no historical basis, he assumes to explain those precedents in the manner most favorable possible to the cause of his country. He says that the precedents are indecisive in regard to the authority which shall preside over the carrying out of the plebiscite, and then, in two of the three cases which have occurred,

it has been that of the cedent country; and that, in regard to those called to exercise the right of suffrage, they have always been the original inhabitants of that portion of territory transferred.

In order to arrive at these deductions he has had to confound the mere material realization, we might say, of this voting with its true political force.

The only explanation which the publicists give, and the only one possible, in harmony with the principles of public law, concerning the country which has charge of the direction of the plebiscite, is that that country has not proceeded in its character of a cedent, except by exercising actual sovereignty, and by suffrage being one of the fundamental attributes of that right.

Even Mr. Seoane charges himself with giving us the proof of that assertion.

He maintains that the precedents are not uniform, since in two of the cases which have occurred, the operation was put into effect under the direction of the cedent country, and in the other (the case of the Lombard-Venetian Kingdom) under the cessionaire country; and, moreover, that in those two cases there was a lack of logic on the part of the cedent country, since if the transfer was agreed upon, the direction of the plebiscite should have been left to the cessionaire country.

But if we examine the precedents in due form, a contrary conclusion is reached, which is that they have been uniform, and that the supposed want of logic is perfectly explicable and justifiable. There is uniformity because in the three cases of plebiscites which have been held they have been effected under the direction of the country which exercised the actual sovereignty. And the supposed want of logic does not exist, because a State, in spite of the fact that it might consent to the transfer of its territory, could not abdicate its sovereignty before the cession was consummated.

The right of suffrage, in its turn, has been granted to the natives of the region for the cause already stated, and not for the reasons which his excellency Mr. Seoane judged convincing.

II.

If by the treaty of peace Peru placed under the sovereignty of Chile the Provinces of Tacna and Arica, stipulating moreover that a plebiscite should decide the definite nationality of that territory, it is logical to suppose that the negotiators of the pact for some reason thought of the procedure in the form in which the history of the institution presents it.

The truth deduced from the events of the war of the Pacific, and the truth from the various negotiations of peace which preceded the treaty of 1883, prove, without doubt, that the plebiscite intended was of the same character as those of its kind; that is, a chosen means for facilitating for the Government of Peru the celebration of peace, proportioning to her a form which would permit her to accept the demand of our country for the cession of Tacna and Arica, without wounding the national feeling.

The first negotiations took place in October, 1880, on board the United States corvette *Lackawanna*, in the presence of two representatives of that Government, which intervened as mediator, and

some time before the war reached its end; that is to say, long before the allied military forces would have found it impossible to oppose an effective resistance to Chilean arms.

In those conferences our representatives exacted, *as conditions essential to peace*, among others, the cession to our country of the territories which extended to the south of the Valley of Camarones, or Tarapaca, on the part of Peru; payment to Chile by Peru and Bolivia combined of 20,000,000 pesos; retention on the part of Chile of the territories of Moquegua, Tacna, and Arica, until all the obligations of the treaty are fulfilled; and, finally, an obligation, on the part of Peru, never to arm the port of Arica, which should have an exclusively commercial character.

The representative of Peru, having manifested that the cession of any part whatever of her territory was wholly unacceptable to his Government, because such a basis of arrangement would be repudiated by the public opinion of his country; and the representatives of Chile having stated that the conditions of peace could not be abridged, the conferences came to an end.

Belligerent operations then continued in various campaigns, all favorable to the army of Chile, and giving as a result the occupation of Lima, the complete destruction of the military forces of Peru and the absence in that country of a stable and regularly constituted Government.

Chile, without taking advantage of the victory, could then impose in justice, for the celebration of peace, conditions more rigorous than before, which would compensate her for the prodigious sacrifices of all kinds occasioned by the war, and which would assure her for the future a military frontier in the north.

The demands of our country were clearly set forth in the following paragraph of the circular of May 26, 1901, directed by the Peruvian Government to the chancelleries of Europe and America, giving account of the motives which induced her to sever her relations with our country:

The victories which afterwards (October, 1880—conferences on the *Lackawanna*) Chile attained awoke greater ambitions; and a year later, 1881, the cession of Tacna and Arica was presented as a condition *sine qua non* of peace, in the negotiations which were opened during the following years.

Without the concurrence of her ally of 1879, or of a mediator as in 1880 and 1882, Peru, being unable to continue with success the hostilities, had to resign herself to consent to the unescapable territorial sacrifices which she had until then resisted.

The assembly of Cajamarca, having vested Gen. Iglesias with the character of president regenerator of Peru, and commending to him the prompt celebration of a treaty of peace, concentrated its forces on making the territorial dismemberment in a form which would not wound the sentiment of the citizens, a point in which the Chilean Government coincided, with the object of securing to the new Peruvian President the support of opinion, and securing thus the celebration of a durable peace.

The Chilean plenipotentiaries, statesmen as they were, sought a form which would reconcile the demands which our country considered could not be mitigated with the susceptibilities of Peruvian patriotism. This consisted in asking the direct and unconditional

cession of Tarapaca, which already opposed no resistance, and the indirect cession of Tacna and Arica—the direct was resisted even in the form of a sale—by a procedure appropriate to the situation, which it was not difficult to find in the history of the plebiscite.

The plebiscite, in effect, would permit the public opinion of Peru to entertain the hope that the territories of Tacna and Arica would remain only temporarily under our sovereignty; and that, the period of 10 years having expired, the vote of the citizens of that region would restore them to their former nationality.

On its part, the Government of Chile considered that period would suffice for that opinion to become convinced that those Provinces should remain definitely incorporated in our country, without plebiscite or by means of a mere form.

Gen. Iglesias signed, on the 10th of May, 1883, a preliminary compromise in which were established the conditions under which he was disposed to subscribe to peace, in conformity with the formula of the Chilean plenipotentiaries.

In this same historic moment, the majority of the Peruvian people pronounced themselves openly in favor of the Iglesias administration, which, in fact, meant the acceptance of preliminary bases. Chile, then, lent her pecuniary and military aid to consolidate the new Government; and, this result attained, the pact of peace was signed on October 20 of the same year, which was only a reproduction of the conditions expressed in the act of May 10.

This is, then, succinctly stated, the logical explanation of the reason for the stipulation of the plebiscite for Tacna and Arica, and, at the same time, the explanation of the object for which it was invoked.

It is not, consequently, as assumed by Peru, on account of her resistance to the cession of Tacna and Arica that Chile desisted from her purpose to annex those Provinces and consent to bind herself in all seriousness to a plebiscite, without precedents in the history of diplomacy.

It would have been stupidity on the part of the Chilean negotiators had they, their country considering that territory as an indispensable pledge of peace in future, renounced the purpose of acquiring its sovereignty only in view of a merely passive resistance by the Peruvian representatives.

A procedure different from that of the plebiscite, but with an analogous object, had been employed by our chancellery a little after the pact of Ancon, for the purpose of minimizing the resistance which Bolivia, ally of Peru in the war, opposed to ceding the seacoast of her territory, which was necessary to us in order to avoid breaking continuity with the Province of Tarapaca.

On April 4, 1884, an indefinite treaty of truce was signed, which, given its stipulations, was rather a treaty of peace. By article 2 of said pact, Bolivia left, herself fixing the respective boundaries, her seacoast territory, occupied then by our arms, under the sovereignty of Chile.

Since the celebration of this treaty, no one has doubted, either in Chile or Bolivia, that the mentioned zone was destined, in reality, to remain incorporated indefinitely in our territory. On this hypothesis all subsequent negotiations by Bolivian statesmen for a definite treaty of peace tend only to obtain a port on the Pacific, an aspira-

tion which Chile always respects, but which she could never satisfy because its realization would leave our territory without continuity.

The governing Bolivians, as experienced politicians, on negotiating the treaty of peace of October 20, 1904, expressly recognized the annexation of that territory to our country, as being on that date an act consummated.

* * * * *

Not only did the negotiations which preceded the treaty of Ancon assume that the plebiscite was a means employed to attain disguisedly the sovereignty of Tacna and Arica, but also the very editing of the pact and other circumstances confirmed it.

Article 3 of the treaty bears a singular analogy to the stipulations for plebiscite contained in the treaties of Turin of 1860, and of Paris of 1877, which, as we have said, signify simple forms of territorial cession.

The first of these treaties says in effect:

It is understood that reunion will be effected without any restraint upon the will of the people, and that the Governments of the Emperor of France and of the King of Sardinia will arrange as soon as possible the best means of estimating and registering the expressions of that will.

And the treaty of Paris:

* * * that retrocession is made under the express condition of the consent of the population of St. Bartholomew, and *en outre*, under the conditions enumerated in a special protocol which will be attached to the present treaty and considered as forming an integral part of it.

The treaty of Ancon establishes in its turn in part 2 of article 3:

A special protocol, which will be considered as an integral part of the present treaty, will establish the form in which the plebiscite ought to take place * * * etc.

The simple reading of these antecedents dispenses with further comments and reasonings.

On the other hand, if the plebiscites of 1883 should have been agreed upon in all seriousness, its negotiators would have given it express and formal definiteness; or would have fixed in the pact itself the conditions for celebrating the plebiscite; or would have referred to another protocol signed together with the principal convention, as was done for certain matters in the treaty of Vienna of October 3, 1866 (Art. VII) and the treaty of Paris of August 10, 1877 (Art. I): or, finally, they would have determined, at least, the means of resolving the difficulty which could have been presented with the motive of discussing the later protocol. And the reason is evident: The negotiators, knowing that on the hypothesis which we discuss, there would exist interests opposed and entirely irreconcilable between both countries, knew before hand by that fact alone that by not adopting at once any of the means before indicated they made impossible all subsequent agreement.

And it should not be said that in this the negotiators were guilty of an oversight because, precisely, in the pact itself and for other matters of less interest, are found laid down different measures which we here indicate. Thus, in articles 4 to 8 the rights and obligations of Chile are minutely regulated with respect to the sale of 1,000,000 tons of guano; in 8, the obligations which may be contracted with

respect to the credits which affect the ceded territories are limited; in articles 9 and 10 the exploitation of guano in the Lobos Islands is regulated; and 11 determines the mercantile relations between both countries. Moreover, in a complementary protocol, signed the same day as the principal pact, matters relating to the Chilean Army of occupation are established; and, finally, article 12 of the treaty establishes that the indemnities which shall be given by Peru to the Chileans who have suffered damage on account of the war shall be determined by an arbitration tribunal in the form indicated in that article itself.

So then the omission which we note with respect to the protocol relating to the plebiscite is deliberate, and can not be explained except as an explicit recognition that the plebiscite stipulated was of the same nature and had the same object as the others registered in the history of international law.

In corroboration also of what we say is the circumstance that article 3 itself of the pact of 1883, which stipulated the plebiscite, did not leave for the subsequent protocol but fixed itself the sum which the nation which should be definite sovereign of the territory should pay to the other.

The economic situation of Peru at that date, and that which the negotiators could foresee 10 years afterwards, which would make impossible certainly the payment of 10,000,000 pesos, establishes the belief that they deemed it fitting to determine in 1883 (and not to allow that it should run the same risk as the conditions of the celebration of the plebiscite) the amount which Chile should pay to Peru for the simulated cession of Tacna and Arica.

There is still another consideration, as much or more decisive than the others. In 1880, in the conferences on board the corvette *Lackawanna*, Chile proposed as one of the essential conditions for the celebration of peace that Peru should promise, after the return of the port of Arica, not to fortify it at any time. It would be truly incomprehensible that three years afterwards, in 1883, when Chile was master of the situation, she should have renounced this demand, which she considered always as irrevocable.

The lack, then, of this demand in the pact of Ancon could not be satisfactorily explained if it were not admitted that Chile considered that the treaty assured her definitely of the sovereignty of the provinces mentioned.

Finally, the parliamentary and public opinion of our country give to the pact of Ancon the force which in reality it had in the conception of its negotiators.

The parliamentary minority of 1883, which maintained a tenacious resistance to the Government, did not wish to let pass without observation an act of so transcendent importance and prestige for the administration of Santa Maria, and made some criticisms of the treaty of peace; but not one of them turned upon the question of Tacna and Arica. "That objection," said Luis Aldunate, one of the negotiators of the pact in his character as minister of foreign relations, "would have appeared senseless in that epoch in which no one doubted for a single instant that giving to Chile possession of these provinces was synonymous with giving her dominion over them." (The treaties of 1883-84. Santiago, 1900, p. 215.)

III.

So penetrated is his excellency, Mr. Seoane, with the idea that it is impossible for an impartial spirit to see in the plebiscite stipulated in the treaty of Ancon an agreement of the same nature as others of the kind that, in his note of May 8 of the present year, he devotes himself by preference to proving that the nature of this pact is not the same as other agreements for plebiscites celebrated in Europe.

He founds his reasoning on the history of the negotiations of the pact of 1883 and on the procedures which since 1892 have been carried out between the two Governments for establishing a basis for the celebration of the plebiscite; on the other circumstance that said pact does not expressly stipulate cession, as analagous agreements have done; and on the circumstance, also, contrary to other like agreements, that the appeal to the popular will would not be made immediately but 10 years afterwards.

In respect to the first argument, we have already sufficiently demonstrated that the negotiations referred to and the military, political, and economic situation in Peru in 1883 establish precisely the contrary to that which His Excellency Mr. Seoane assumes.

As to the negotiations which since 1892 have been carried into effect between the two Governments for agreeing upon a basis for a celebration of the plebiscite they prove, as we shall see further on, not that Chile has not seen in this pact a cession, but only that she has not wished to allege one; that is to say, that in the course of said negotiations Chile has never assumed, as she does not assume now, to emphasize her rights, wounding the national sentiment of Peru. Always, on the contrary, she has been most solicitous in her pains to arrive at that result by means of a sincere and friendly agreement, proposing to the Chancellery of Lima that she should renounce the celebration of the plebiscite or that this should be effected on equitable bases, in which she has faith, but which, nevertheless, are capable of giving the triumph to Peru.

It is not strange, then, nor a matter for wonder, as Mr. Seoane wonders, that in some official communications and other diplomatic documents of Chile, especially in the Chile-Bolivian treaty of 1895 (a treaty which was not put into effect) the possibility that the Provinces of Tacna and Arica may return to the sovereignty of Peru is talked of or admitted.

The third argument has no more value than the foregoing ones.

In the pact of 1883, the cession of Tacna and Arica appears with the same characteristics as the cessions of territory in other agreements concerning plebiscites. In the pact it is not said, it is true, that Peru *ceded* to Chile Tacna and Arica, owing to this cession remaining submitted to a later plebiscite; but, on the other hand, it is said that our territory "will continue possessed by Chile and subject to Chilean laws and authority," which expression is equivalent to the former, since in international law there is no difference between *ceding* a territory and *placing it under the sovereignty of another country*, since the essential and characteristic of a cession is that the territory shall remain subject to the sovereignty of that country acquiring it. If the word cession was deliberately omitted it was pre-

cisely for the purpose of avoiding the susceptibilities of the Peruvian people.

Finally, as to the argument of Mr. Seoane on the difference in time for the celebration of the plebiscite which exists between the pact of Ancon and those which have preceded it, far from having the importance which he attributes to it, it has its natural significance.

In those cases which history registers, the plebiscite has been carried into effect a short time after its stipulation because it treated of a cession which was not resisted by the country which made the transfer. In the case of Tacna and Arica, as it treated of a resisted cession, which it was desired to make without violence, there was fixed the period of 10 years, a lapse of time which was esteemed necessary in order that the Peruvian people might resign themselves to seeing definitely incorporated into the sovereignty of Chile, without plebiscite, or by means of one which would give the triumph to our country, a portion of territory which they believed to be only temporarily in our power.

This is the only explanation of the period fixed, because the Chilean negotiators would have proceeded with absolute lack of experience if, agreeing upon a serious plebiscite, they had supposed that our country would in 10 years conquer the will of the original inhabitants of Tacna and Arica, or if they had sought, in that lapse of time in which the territory was placed under our sovereignty, an indemnity of war, since they knew that the estimated costs of those provinces would impose upon Chile a considerable loss.

These causes alleged by Mr. Seoane, then, for maintaining that the plebiscite of the pact of Ancon is of a different nature from those of like character registered by diplomatic history having no value, it remains perfectly clear that said agreement could have no other object than that of facilitating territorial cession.

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The plenipotentiary of Peru gives such importance to the period of 10 years stipulated in the pact of 83 that he even maintains that from March 28, 1894, the date on which those 10 years expired, our country ceased to be sovereign of Tacna and Arica, and that that sovereignty has passed in full to Peru.

This assumption, as we have demonstrated before, has for its object only to give pretext for a thesis that the Government of Peru is forced at all costs to sustain; that our country, by not actually exercising sovereignty in Tacna and Arica, can not preside over the operation of the plebiscite.

The period which the pact of 1883 fixed for the celebration of the plebiscite is of like nature with those fixed in the plebiscites which the history of the institution registers, and changes in no manner the nature of the cession, because that lapse of time—10 years—does not place an end to the exercise of Chilean sovereignty, but is a minimum period before which a consultation of the popular will could not be made.

The disposition of article 3 of the treaty of Ancon is conclusive in this respect:

At the expiration of that term (10 years) a *plebiscite* shall, by means of a popular vote, decide whether the territory of the provinces referred to is to remain *definitely* under the dominion and sovereignty of Chile, or *continue* to form a part of the Peruvian territory.

As our chancellery observed with much exactness in its communication of March 15, 1905, Peru ceded to our country, according to the tenor of the pact of Ancon, full and absolute sovereignty over Tacna and Arica without any limitation in regard to *its exercise*, and limited, in regard to its *duration*, only by the event of the plebiscite declaring in favor of a return to Peru.

Only in this case would those provinces return to Peru to *continue* forming a part of her territory, as they were before 1883. That is the true significance of the word *continue*, and to give it other is to destroy article 3 and place that term in contradiction to the word *definitely*, which the same pact employs to indicate the sovereignty which Chile will exercise if the plebiscite results in her favor. And it is an elementary rule of the interpretation of treaties to seek for accord or harmony in their dispositions in place of giving them a force which makes them appear contradictory.

If neither the plebiscite, although it had been agreed upon seriously, nor any other more effective condition, could change or diminish the complete exercise of the sovereignty of Chile, it remains hers with greater reason when, as in the present case, the plebiscite is a mere form and destined in the minds of those who arranged it not to have a true practical application.

In respect to the prolongation of the period of 10 years which the chancellery of Lima states that the chancellery of Santiago solicited in 1894, this is to have been effective—since there is no verification of the incident in the archives of the ministry of foreign relations in the Monada—would have proved only that a prolongation of the period was solicited for the celebration of the plebiscite, but not for the exercise of sovereignty in that region.

So, then, the expiration of the period of 10 years in no manner put an end to Chilean sovereignty in Tacna and Arica, and, less still, returned it *ipse facto* to Peru.

Neither the letter nor the spirit of the pact of 1883 authorizes this interpretation.

If it were thus, it would result that no celebration of the plebiscite would suit Peru better than if it were verified, since in this case that territory would not return to her sovereignty except in the event of the voting being favorable.

Finally, if the negotiators had wished to confer upon Chile the simple right of occupation for a limited time of Tacna and Arica, they would have done so in a formal and express manner, as was the case in article 9 of the treaty of Ancon for the Lobos Islands. The article disposes in respect to those islands that—

they shall continue to be administered by the Government of Chile until the extraction of 1,000,000 tons of guano from existing beds has been completed in conformity with the stipulations in articles 4 and 7. They shall then be restored to Peru.

The remaining of Chilean authority in Tacna and Arica since March 28, 1894, is, in consequence, very far from being "evidently illegal," as Mr. Seoane affirms. The Government of Peru itself has not dared always to sustain this thesis; and on one occasion it solemnly recognized that the Provinces of Tacna and Arica were under the full sovereignty of Chile.

Article 2 of the treaty of delimitation of frontiers between Peru and Bolivia, celebrated September 23, 1902, and ratified January 30, 1904, says:

The high contracting parties agree on proceeding, according to the stipulations of the present treaty, to the demarcation of the line which separates the Provinces of Tacna and Arica from the Bolivian Province of Carangas, *immediately after they are returned* to be under the sovereignty of Peru.

So that the territories mentioned, according to the Peruvian Government's own words, are at this date under the sovereignty of Chile.

IV.

The considerations hitherto expressed clearly show the right of Chile to maintain that the Provinces of Tacna and Arica have been ceded by the pact of Ancon; that the plebiscite stipulated is a mere form; and that, consequently, as in the case of all plebiscites held to this day, it should be celebrated under conditions which should give a result favorable to annexation.

Apart from this consideration, and in conformity with the principles of public law and diplomatic precedents, the act, in the event of being carried out, ought to be under the exclusive direction of Chilean authorities; and in order to reach a favorable result, the right to vote belongs solely to Chilean residents in Tacna and Arica, because they are the nationals of the country which exercises sovereignty and are disposed to vote in favor of annexation.

The Government of Chile, nevertheless, inspired with the same motive of conduct as the European nations to-day pursue in the armed conflicts, that is to say, forgetfulness of the past and unification of their interests for the future, have carefully abstained, since the treaty of 1883, from alleging that said pact involved a cession of territory. And, without abandoning in the least their proposition to incorporate Tacna and Arica into Chile's sovereignty, they have managed to obtain that result, availing themselves of entirely tranquil and friendly means.

This explains why our chancellery offered to Peru, a little after the pact, in 1888, 1889, and 1890, and before the country initiated action concerning the celebration of the plebiscite—as witnesses the Errazuriz-Bacourt protocol of July 23, 1892, and of the Peruvian circular of May 26, 1901—4,000,000 pesos more than those already stipulated, on condition that she would consent to recognize directly and immediately the definite annexation of Tacna and Arica to our territory.

This explains also why, since the initiation on the part of the chancellery of Lima of steps for the celebration of the plebiscite, our action, in place of alleging that this act ought or ought not to be carried out, or that being put into effect it should be a mere form, placed no obstacle in the way of entering into negotiations on its celebration, except on the more equitable basis which we indicated, in which we had complete faith for success, but which, nevertheless, involved the said possibility of giving the triumph to Peru.

These bases are: That the plebiscite should not be to the detriment of the sovereignty of Chile in Tacna and Arica, and that the voting on the plebiscite should be in conformity with the pact of Ancon, truly *popular*, that is to say, that the right of suffrage shall

be given not only to Chileans and Peruvians resident in Tacna and Arica, but also the foreign element which are here found rooted.

In conformity with the same political proposition which inspired Chile with respect to Peru, she has abstained from raising the question of the majority of votes which would be necessary in order that the provinces of Tacna and Arica should return to Peru.

In this matter, the condition of both countries is quite different: Chile exercises full sovereignty over that territory, and Peru has only a mere expectation of recovering it.

Our country has, then, a perfect right to demand that it shall not be the will of the simple majority of the voters which shall deprive her of that sovereignty, but a much larger number of voters, seeing that the treaty of Ancon says nothing on this subject, and that the doctrine of the absolute majority has no application in international law.

On this point Chile can invoke not only the general opinion of the publicists (especially Lieber, "*De la Valeur des Plébiscites dans le Droit International*" in the "*Revue de Droit International et de Législation Comparée*, T. III, 1871, p. 143), but also that opinion in a case which is well attested. Treating of the plebiscite of Schleswig, distinguished authorities on treaties held that for the northern part of this duchy to return to Denmark, as had been stipulated in article 5 of the treaty of Prague, unanimity of votes or a preponderating majority was necessary. (See Thudichum, in the "*Revue de Droit International et de Législation Comparée*, T. II, 1870, pp. 721-722.)

It is impossible, politically speaking, to give a more sincere proof of desires for international concord.

This excessive good will on the part of Chile is not the only testimony of friendly concord offered in homage to a true reconciliation.

Shortly after the war, Chile paved the way for tribunals of arbitration in diverse countries for payment to their nationals for damages caused by her sea and land forces on account of belligerent operations.

On the other hand, she has done nothing to obtain from Peru the payment of the indemnities stipulated in article 12 of the treaty of Ancon or of other pecuniary obligations arising also from the War of the Pacific.

But that is not all.

In spite of it having been stipulated in article 8 of the same treaty of 1883 that aside from the obligations contracted by Chile in favor of third parties she "would recognize no debts which may affect the new territories acquired by the present treaty, whatever may be their nature and origin," in spite, let us say, of that declaration, Chile, besides having subscribed with France to the Errazuriz-Bacourt protocol of July 23, 1892, which is not an analagous case, dictated the law of April 18, 1887, which authorized our Government to contract a foreign debt which would produce the sum of 1,113,781 pounds sterling for the payment of nitrate certificates contracted by the Government of Peru.

Nor is this all: Chile, desirous of giving new facilities to Peru for the payment of her creditors, subscribed with her to the protocol of January 8, 1890, which in its article 1, establishes that, with the

object of smoothing the difficulties which had been presented to Peru for the cancellation of her external debt, proceeding from the loans of 1869, 1870, and 1872, Chile "grants to her freely and spontaneously" the sums which are enumerated in said article.

There are, then, abundant reasons for affirming that the chancery of the Moneda has followed with all faithfulness, with respect to Peru, the policy of assuming greater obligations than those contracted in the pact of Ancon, and has not exercised the rights which said pact confers upon it, especially in what concerns Tacna and Arica. And this orientation, we again repeat, is owing to a purpose more elevated still: The desire not to have in her neighbor at the North an enduring enemy, but a sister nation which should know to forget the events of the past in order to take up fully the great political and economic problems which are theirs in common.

V.

Peru, viewing the problem only from the point of view of her own convenience, has not wished to accept the basis proposed by our Government for the celebration of the plebiscite, and believing, doubtless, that the circumstance of Chile not having alleged the true value of the pact of Ancon meant that she believed the stipulation was serious, she has assumed, as conditions of execution, that she is detached from the sovereignty which Chile now exercises in Tacna and Arica, and that the right of suffrage is conceded only to the original Peruvians of those Provinces.

What is assumed, in effect, is to make a mere form of plebiscite binding, that the said territory, shaking off Chile, should return by way of diplomacy what diplomacy in 1883 ceded to us, by the same plebiscite, for our tranquil future.

Laying aside these premises, it is not curious then that the Government of Lima and Peruvian public opinion should have had confidence in the triumph and believe that the celebration of the plebiscite will necessarily bring as a result the restitution of those Provinces to the sovereignty of Peru.

After many years of futile initiative and of broken relations between Peru and Chile, our chancellery invited that of Lima, in a communication of February 15, 1905, "to procure an agreement based on the interests and convenience of both Republics."

In a like sense His Excellency Mr. Riesco replied to the reception address of His Excellency Mr. Alvarez Calderon, adding that he was pleased to believe that the Peruvian Government would be inspired by like sentiments and purposes.

Our Government, wishing to be more explicit yet in the new political course which it deemed could lead to a satisfactory result, expressly declared, in its note of March 25 of the present year, that with the object of assuring to Peru forever the greatest cordiality of relations—

it would be disposed not to hold strictly the rights which accord with the spirit and the letter of clause 3 of the treaty of Ancon, nor to maintain itself exactly in the field in which publicists and diplomatic precedents place plebiscites, if on her part Peru will facilitate the arrangement and renounce her extreme pretensions, which will undoubtedly frustrate any solution.

In conjunction with this declaration, he proposed a series of joint agreements, which, by uniting diverse elements, would be considered as an indivisible whole which would include the following matters:

1. Arrange a commercial convention which shall grant exemption from customs to certain stated projects of each country that are of use in the other.

2. Celebration of an agreement for the promotion of the merchant marine and for the establishment of a line of steamers at the expense or by the subvention of the two Governments, with the object of developing a coast trade.

3. Association of the two countries for the realization of their resources and their credit in joining the capitals of Santiago and Lima by railway.

4. Arrangement of the protocol for establishing the form of plebiscite stipulated for the determination of the definite nationality of Tacna and Arica.

5. Arrangement to raise the amount of indemnity which the country acquiring definite sovereignty over this territory shall give to the other.

In this same note are placed in evidence the advantages resulting to the two nations from the adoption of the measures proposed.

A form which, in the conception of Mr. Puga Borne, would relieve considerably the financial operation referred to in the fifth agreement, causing it to lose the character of compensation which it had in the pact of 1883, would be to combine the payment "with the service of the debt which would be contracted for the construction of the international railway line."

His Excellency Mr. Seoane, far from accepting the solution of concord and fraternity proposed by our chancellery, declared that his Government "had laid aside that series of heterogeneous agreements," which had no relation with the plebiscite; which is of a political character; and that the only thing his country desires is the immediate fulfillment of the pact of Ancon in the part relative to the celebration of the plebiscite, because this matter "is of such importance that before it all others appear of second rank." He added that the actions which had been recommended "have for their object the fulfillment, not the modification, of article 3 of the treaty of peace;" and that the invitation which our Government directed to the chancellery at Lima "does not lay upon Peru the direct arrangement or exempt Chile from the formality of a plebiscite."

With this attitude, the Government of Peru disowns the history of the negotiations followed by both countries, and refuses to understand the terms in which the chancellery of Santiago has presented the solution of the problem, and the motives which have induced her to proceed in this way.

If in 1905 all negotiations relative to the later protocol to which article 3 of the treaty of Ancon referred were declared fruitless and if an invitation was given to Peru with the object and force determined, the chancellery of Lima should have declined it immediately if not disposed to accept it in this form, and not have proceeded to the naming of plenipotentiaries charged only to declare that they would not accept this orientation of our policy, and whose only mission to the present has consisted in wishing to continue in the field of fruitless negotiations.

The Peruvian representative added, moreover, as a fundamental of his refusal that a like refusal was given by our Government in 1893, when the Chilean minister in Lima made propositions on the part of Peru "of considerable similarity with the present."

Suffice it to observe to Mr. Seoane that such analogy does not exist; what was proposed in 1892 by the Peruvian Government was the return of Tacna and Arica in exchange for commercial agreements which were favorable to our country, which was equivalent to contradicting openly the force of the pact of Ancon; while that which Chile now proposes is very different: The binding of political and economic interests between the two Republics, and the celebration of the plebiscite on an equitable basis and not as a mere form as stipulated by the pact of Ancon.

* * * * *

It is appropriate now to examine the basis for the celebration of the plebiscite which our chancellery has indicated as one of the conditions for not alleging the true force of the pact of 1883, and which is the only matter concerning which Mr. Seoane wishes to centralize the negotiations.

These bases are the following:

1. That the plebiscite shall be effected under the direction of the Chilean authorities, as our country exercises sovereignty in that territory.

Mr. Puga Borne in this respect declares that the Government of Chile shall adopt the most adequate means in order that the consultation of the popular will shall not give rise to the slightest lack of confidence on the part of Peru; and adds that it does not seem unfitting "in order that our authorities, on establishing the electoral boards, should give representation on them to the citizens of Peruvian nationality and to the citizens of other nationalities; and

2. That those Chileans, Peruvians, and foreigners resident in Tacna and Arica shall have the right to vote, under certain conditions.

It seems unnecessary to us to add that the first basis proposed is the more equitable, in that, in conformity with the general principles of international law, it belongs to Chile to preside because she exercises full sovereignty over Tacna and Arica, and the plebiscite is an act which is referred to her. Mr. Seoane himself, in two passages of his note, recognizes that the plebiscite is an act which is derived from sovereignty.

As for the bearing of diplomatic precedents, they are, as we have already seen, unanimous in the sentiment that the plebiscite shall be carried out under the direction of the country which exercises sovereignty over that territory.

These principles have such irresistible force that the Government of Peru itself, convinced of it, and that according to historical precedents the plebiscite of Tacna and Arica ought to be carried out under the direction of Chilean authorities, has seen itself compelled—and especially His Excellency Mr. Seoane, in his note of May 28—to make the strange affirmation on which we have just dwelt: That our country does not now exercise sovereignty over that territory, because in 1894 the period of 10 years which the treaty of Ancon granted to Chile for the exercise of this right expired.

The history of the transactions between both countries furnishes, moreover, unequivocal data on which, in the conception of Peru, the country which exercises the sovereignty is that which ought to preside over the operation of the plebiscite.

In the conference celebrated and protocolized in Lima, June 19, 1893, between the minister of foreign relations of Peru and the plenipotentiary of Chile, to determine the basis for the celebration of the plebiscite, the former set forth that at the expiration of the 10 years granted to Chile for the occupation of Tacna and Arica she would return them to Peru, which was the sovereign of that territory, so that she might proceed to the celebration of the plebiscite. (See the true force of this proposition in Pradier-Fodéré "*L'Amérique Espagnole*," in the "*Revue de Droit International et de Législation Comparée*," T. 29, 1897, p. 661.)

This proposition was immediately discarded.

In view of this refusal, in a conference protocolized June 30 of the same year the Peruvian chancellor proposed to our minister by way of adjustment, that those Provinces should be delivered on a designated date to a third power, under whose auspices the plebiscite should be carried out, and which would immediately return the Provinces to the country in whose favor the voting resulted.

Said proposition was likewise discarded by our representative, who maintained that Chile had the right to occupy the territories referred to until Peru should fulfill all obligations which clause 3 of the treaty of Ancon imposed upon her.

Finally, under date of August 19, 1893, the minister of foreign relations of Peru sent to our minister, Mr. Vial Solar, a memorandum which establishes the following:

The plenipotentiaries of Peru and Chile, not having agreed as to which of these Governments has the right to occupy the territory of Tacna and Arica during the plebiscite of which article 3 of the treaty of Ancon treats, it is agreed that Peru shall possess the zone comprehended between the River of Sama and the Valley of Vitor, and that Chile shall continue in the tenancy of the zone between this last valley and that of Camarones. On March 28, 1894, there will be delivered to Peru that part of the territory referred to and within 30 days following each country will dictate the arrangement of proceedings for the voting in its respective zone, remaining at liberty to point out the personal requisites of the voters.

These propositions were also discarded, because they did not take into consideration the interests of Chile.

In a conference between the minister of foreign relations of Peru and our plenipotentiary in Lima, protocolized under date of December 7, 1893, the Peruvian chancellery asked, as a preliminary basis for going to vote, that there be submitted to arbitration, among other points, that of determining which of the two countries held possession of Tacna and Arica after March 28, 1894. The minister of Chile rejected this proposition, adding that the Peruvian Government ought to have complete faith in the honor and loyalty of Chile, and that to give proof of it, he held it not unfitting to make binding appropriate guaranties. The minister of foreign relations of Peru then asked if there could be included "the intervention of Peruvian functionaries in the act of the plebiscite."

From all those actions and declarations is deduced, then, that in the conception of Peru, the plebiscite ought to be carried out under

the direction of the State which exercised the sovereignty in that zone.

* * * * *

Mr. Seoane refused and characterized as absurd the second proposal by our chancellery for the celebration of the plebiscite; that is, that not only the Chileans and Peruvians resident in Tacna and Arica should have the suffrage, but also the foreigners.

In the sense of the Peruvian representative, only the natives of that territory should enjoy the right of suffrage, and not foreigners or Chileans, because the latter are, in his judgment, as much strangers in that region as those of any other nationality.

Such a pretension, sustained many times by the chancellery of Peru, and explicable solely by exaggerations of the popular sentiment, is that which, in reality, merits the characterization which it gives to the Chilean proposition.

The demand that in the plebiscite only the original Peruvians of Tacna and Arica should vote, founding itself on the supposition that this is the spirit of the pact of Ancon, would oblige one to suppose in the Chilean negotiators an absolute lack of perspicacity and political sense, in that they would appear to have entered seriously into a proceeding of well-known import, with results foreseen and contrary to the purposes of Chile. If they had admitted that Tacna and Arica should return to the power of Peru, they would have expressly so stated, in place of binding themselves to a proceeding which, if it is justifiable to disguise a cession, is absurd for the return of territory which it had no intention to acquire.

Neither is it said that the period of 10 years is fixed in order that Chile could gain in that period of time the good will of the original inhabitants of the region indicated, since such an explanation would suppose that the negotiators forged deceptive illusions, incompatible with the foresighted judgment of any man versed in Government. They could not reasonably believe that 10 years of Chilean sovereignty in Tacna and Arica would change in our favor the sentiment of the citizens of that region. It would be to infer in them a gratuitous offense to suppose that they were ignorant or had forgotten the lessons of history, which show us territories for more than a century under powerful nations which, nevertheless, maintain alive to-day the sentiment of protest against that dominion.

Supposing, then, that the negotiators of the treaty of peace had bound themselves in all seriousness to the plebiscite, which can be admitted only by way of hypothesis, the period of 10 years being conceded in which our country might win converts to its cause, it could not in any case gain the Peruvian element, whose votes must be hostile to Chile, or the Chilean element, whose votes must be favorable.

It is clear, then, as regards the proposition of gaining good will, that the "arduous work of Chileanization," as Mr. Seoane said with very marked intention (a work which he declared futile) would refer exclusively to foreigners and in no manner to the Peruvians.

It would not be difficult for Mr. Seoane to believe that the Government of Chile never has had the purpose of changing the national sentiment of the Peruvians resident in Tacna and Arica.

So convinced is the chancellery of Lima that in the plebiscite not only the original inhabitants of that territory ought to vote, but also the Chileans and foreigners there resident, that more than once she

has proposed it to the consideration of our Government. (Memorandum presented to our chancellery by the minister of Peru to Chile, Feb. 23, 1894, and proposition presented by the same diplomat to the Chilean Government in October of the same year. Both documents appear inserted in the "Circular on the question of Tacna and Arica," published by the Government of Peru, pp. 200 and 221.)

Nevertheless, in the circular of 1901 to all the chancelleries, the Government of Peru again declares that, in its conception, there ought to vote in the plebiscite "only the native Peruvians of these Provinces, who have residence there."

On the other hand, Mr. Seoane, dissenting from the fact that the Chilean proposition is a condition proposed with the object of giving its true force to the pact of Ancon, impugns it with various arguments of no effective worth.

He alleges, in the first place, that even the minister of foreign relations of Chile himself, Mr. Luis Aldunate, as author of the present study, has sustained in some publications the doctrines that his Government now sustains.

A rectification sufficiently detailed of both opinions has been published in the *Mercurio* of Santiago, of June 18 and 20 of the present year. Such publication sets forth that in the articles mentioned by Mr. Seoane (those of Mr. Aldunate published in *El Ferrocarril* of June 7 to 30, 1900, bound later in a pamphlet; and ours, published in the same paper of the 5th, 6th, and 7th of April of the same year) the pact of Ancon, in the part relative to the celebration of the plebiscite, ought to be considered as equal to all the agreements of this nature, as a cession of territory. We, departing from the fundamental basis that the plebiscite must be a mere form, exclude from the right of suffrage the women and foreigners, an exclusion which lacks importance from the point of view of party, and which, without saying it, shows that the right of suffrage in our concept belongs only to the Chileans.

It is to be seen that Mr. Seoane does not share the views which dominate in said article, and which constitute its synthesis: The convenience with which Peru, abandoning vindictive aspirations over Tacna and Arica, may consent to recognize said Provinces as definitely incorporated in our country in exchange for liberal concessions of all kinds.

Other reasonings brought forth by Mr. Seoane are of a doctrinaire-philosophical character.

They are founded on the consideration that the plebiscite vote is an act of a political character and that in every act of this sort constitutional law excludes foreigners; that it is not possible to allow that the foreigners resident in Tacna and Arica should vote when the nationals of the rest of the Peruvian territory do not have this right, since thus the foreigners would be in the more advantageous political situation; that to concede to the foreign element the right of suffrage is equivalent to conceding them joint dominion, equal to the owners, over the territory which they temporarily inhabit, and that their vote in favor of Chile not only would mean the violation of neutrality which they as foreigners are obliged to maintain, but would be an effective step in the act of conquest.

In brief, all his reasoning can be summed up in the statement that foreigners ought not to mix in matters that are without interest to

them, or that, having an interest, it is in every case less than that of the nationals of the respective countries.

In this manner of arguing, Mr. Seoane confounds political suffrage, which is conceded only to the citizens of a country, and which is a matter of constitutional law in each State, with the plebiscite suffrage which belongs to international law and which is governed only by the will of the parties to it.

In an international plebiscite, which involves a simulated transfer, the stipulation "popular vote," "vote of the inhabitants," is restricted, as we have seen, to the nationals of the country which exercises the sovereignty, and natives of the region when those are decided partisans of the transfer of territory.

But in a serious and impartial plebiscite, as Peru assumes that one agreed upon in 1883 to be, those expressions—the first of which is found in the pact—ought to be taken in a wide sense which will comprehend above all the foreign element which, as neutral in the dispute, is best adapted in resolving it by that pacific method.

Accepting the argument of Mr. Seoane, we should have to admit as logical the paradoxical conclusion that foreigners could never decide as arbiters in an international conflict.

If it treated of matters which only affect the nationals of a country there is no doubt that perfect reason would attend the argument of Mr. Seoane. But in the present case we are not concerned with who has the more interest in Tacna and Arica, the nationals or the foreigners. What concerns us is the resolving of the conflict in which Chileans and Peruvians hold contrary opinions. In such circumstances, the foreign element is naturally the more apt if not to resolve, at least to contribute to a solution of the difficulty. Its quality of neutral in the question of national *amour propre* and that of interested party in the prosperity of the region would permit it to estimate, in just measure, which of the two countries ought to exercise definite sovereignty in the territory.

Finally, as to the diplomatic precedents invoked on this point, they are entirely unfavorable to the cause of Peru; because, as we have always also had the occasion of setting forth and demonstrating, that which may be deduced from them is that in the operation of the plebiscite only the elements take part which, within their respective territory, are found more disposed to vote in favor of annexation.

* * * * *

Mr. Seoane himself, who in order to combat the basis proposed by our Government for the celebration of the plebiscite, invokes the diplomatic precedents, recognizes afterwards implicitly, when concrete propositions for the carrying out of the act are presented, that said precedents are unfavorable to him.

Thus he proposes as a basis for negotiations the Billinghurst-Latorre protocol, adapting to the opposing clause of that agreement "the positive precepts of diplomatic precedents, according to the principles of right and of justice."

The first part of this proposition is in every way unacceptable, because it attempts to revive an obsolete agreement which from the very hour of giving it publicity was categorically refused by public opinion in our country. This unappeasable resistance to the cited protocol explains, without the necessity of more comment, the reason why our Government, making itself a faithful interpreter of that

opinion, has declared on repeated occasions that it could not accept the clauses of that agreement, which should be considered as eliminated forever and incapable in future of serving as a basis of discussion between the chancelleries of Lima and Santiago.

To assume, moreover, as Mr. Seoane proposes, that the diplomatic antecedents of a plebiscite should be taken into consideration "according to the principles of right and of justice" is equal to demanding that those antecedents shall be taken into account, not as diplomatic history presents them, which is the only point of view from which the negotiators of the pact of Ancon have considered them, but in an entirely imaginary cause, which Peru formulates in defense of her interests.

V.

The chancellery of Peru has observed, in the controversy over Tacna and Arica, a truly extraordinary attitude; since it not only declared in its communication of May 8 of the present year that it would not take into account the Chilean propositions, but that it would hasten to give them publicity, with purposes which we do not attempt to explain. If we should attribute to this proceeding the significance which it has in diplomatic practice, we should be obliged to admit that Peru has wished to put an end to the negotiations proposed by our country.

Chile could, then, in view of that attitude consider herself released from her propositions for arrangement, and recover her complete liberty of action; but persisting in her desire to reach a friendly agreement she has confidence that it is not the intention of Peru to close the doors of a future approach.

Nevertheless our country—her Government and public opinion—does not now wish futile debates of a character more academic than practical and is opposed to continuing on this ground a discussion of chancelleries which renders rather more distant the solution of the difficulty.

Altogether it is fitting to examine the international situation created by the lack of agreement between Chile and Peru over the fulfillment of the pact of Ancon.

And this, well understood, in the knowledge that our Government persists in its purpose that Peru shall correspond to our policy of concord in a lasting agreement between the two countries.

Let us lay aside, then, the case which we would were only hypothetical, that Chile, not seeing the possibility of attaining this result, has resolved to give up all negotiations and to declare that, heeding the text and the spirit of the treaty of Ancon, she considers the Provinces of Tacna and Arica definitely incorporated in her sovereignty, and without other obligation, in conformity with the same pact, than the payment to Peru of 10,000,000 pesos in silver.

Aside from the question of this there exist between Chile and Peru entirely contradictory political interests.

Peru desires the reincorporation of those Provinces in her sovereignty, and Chile, actual sovereign over them, desires in her turn that they remain definitely incorporated in her territory. If that desire is worthy of respect, that of our country is more so, because it is founded not only on patriotic considerations, as in the case of Peru, but on reasons of security on her frontier tending to insure peace in

the future and on the desire of not separating herself from a territory which has for 30 years formed an integral part of her national unity.

The controversy, given the basis on which Chile has proceeded in these negotiations and the objective sought with them, is not susceptible of being submitted to arbitration.

In effect, if our country has not exercised the right which the pact of Ancon conceded to it, according to which Tacna and Arica have been ceded to it in a definite manner, it is only on condition that Peru assent, among other conditions, to the celebration of the plebiscite on the bases which are proposed to her. It is not, then, conceived to be possible to assume that the lack of agreement over them could be handed over to the decision of an arbitrary judge.

Laying aside the former consideration, a traditional motive of the policy of our country has been to consider that arbitration is generally the best means of resolving difficulties between nations and, as a consequence of this judgment, she has bound herself for existing conflicts or for future difficulties perhaps more than any country in America.

But, in spite of this homage to the principle, the Chilean Government does not fall into the error of considering it as a panacea for the solution of all classes of conflicts and disagreements, as proclaimed by certain spiritual philosophers guided by noble humanitarian aspirations rather than by the reality of international life.

In many matters and in many cases, as is proved by the history of nations, that method of settling discords is not possible or acceptable. The solution of difficulties is sought, then, in reciprocal good will, since this mutual understanding has been, in all epochs, the truest and most solid guaranty of peace between the States.

The case of Tacna and Arica presents a matter which for our country is of vital importance, because it refers to the security of its northern frontier and its sovereign rights; and, in the present state of international law, matters of that character are not susceptible of arbitrary solution.

To Chile, certainly, it is not possible to admit that the matter should be in doubt, and, in consequence, to pretend to hand over to arbitration the decision as to whether or not she exercises actual sovereignty in Tacna and Arica, or whether in such character she has the right or not to preside over the operation of the plebiscite.

Neither can she admit that there must be submitted to the same procedure the question of whether or not the Chileans and foreigners in Tacna and Arica have the right under certain conditions to vote, because to place this demand in doubt would be necessarily to reduce oneself to the absurdity of admitting that Chile had bound herself to a plebiscite that was favorable to Peru.

Chile, then, believes that if in the present difficulty an arbiter should intervene it should not be a judge who would decide in accordance with certain legal solemnities, but a collection of persons conscious of the political conveniences of that territory. These could not be other than the inhabitants of Tacna and Arica, including the foreigners who, as mediators between Chileans and Peruvians, would have the keenest interest in weighing the problem without any passion,

without distinctions of jurists, and attending only to the present and future convenience of that region.

* * * * *

The present conflict not being capable by its origin, antecedents, and character of being submitted to the decision of an arbitration tribunal, whatever may be the dissenting opinion, is susceptible of but one solution.

In conformity with a *strictly judicial* judgment, the lack of approach between the parties in arriving at an agreement which by the disposition of the pact of 1883 they ought to celebrate, makes impossible that agreement and, in consequence, means the ineffectiveness of said clause, but not that of the principal pact.

The reason of the latter fact is found in that this agreement, given the object and spirit which guided the negotiators, is not necessary for the subsistence of the treaty, in spite of the stipulation that it would be considered an integral part of the treaty, since all clauses which constitute or form a part of an international agreement are not of the essence.

The ineffectiveness of the clause referred to would give as a result the ineffectiveness of the eventuality by which Chile might lose sovereignty over Tacna and Arica, and she should remain the definite sovereign without other obligation than to pay to Peru the 10,000,000 pesos stipulated in the treaty of peace.

In conformity with a *political* judgment, the passing of time would create for the country which, without being definite sovereign of the territory, exercises with sufficient title authority over it, a right which will go on strengthening with the years, even to the acquisition, in an epoch which it is not possible to designate—since it depends upon circumstances—the character of permanency.

The foundation of this fact is found in that sovereignty by its very nature must be always effective; since it consists precisely in subjecting a portion of territory to its authority and laws. A *nudum jus* of sovereignty for an indefinite time is incomprehensible.

Moreover, the exercise of sovereignty goes on binding the interests of the country which exercises it to the respective territory; and that binding of interests, when it is complete, constitutes a fact of such importance and force that the sovereign state can impose it with the respect of all nations, with the character of a definite act on condition of giving an adequate indemnity to the other interested country.

If the passing of time should not confer sovereignty upon a territory and in the name of ideals of justice there should be given place to recoveries founded on historical right, the map of the world would be made over completely and replaced by another which would certainly be more arbitrary and unjust than the present one.

Laying aside the occupation of Egypt by England, let us cite in support of our assertion two very characteristic cases: The right of occupation and administration which Turkey granted to England by the treaty of June 4, 1878, over the island of Cyprus; and a like right granted to Austria-Hungary over Bosnia and Herzegovina, by article 25 of the treaty of Berlin of 1878.

With respect to this case—in these present moments of great reality—it suffices to observe that, notwithstanding the stipulation in

the agreement of April 21, 1879, between Austria and Turkey, destined to regulate that occupation, Austria has gradually gone on accentuating her rights over that territory and considering it as absolutely subject to her sovereignty. Lastly, and founded on motives of a political character which it is not opportune to expose, that country has declared by a circular to the chancelleries of all the powers signatory to the treaty of Berlin that she annexes Bosnia and Herzegovina definitely to her territory. Such declaration, in spite of its being unexpected and of the dangers which it holds for European peace, has not preoccupied the great powers—the same as the political emancipation of Bulgaria—except as they relate to the alterations of equilibrium established by the treaty, and because there is no agreement concerning the indemnities which ought or ought not to be given for said territorial modifications.

We do not wish to compare the case of Bosnia and Herzegovina with that of Tacna and Arica, because our right in these Provinces is not merely of occupation and administration but of complete sovereignty; because it is only a question which affects two countries and has no relation to any system of continental equilibrium; and because the pact of 1883 fixed the indemnity which ought to be given to the other country by that one which remains as definite sovereign of the territory.

Finally, considering the question with the judgment of *statesmen* who should be guided more by diplomatic precedents and political considerations than by the rigorous precepts of private law, Chile can ask of Peru the modification of the treaty of peace relative to the plebiscite, being able to give her in exchange an adequate indemnity.

On proceeding thus, she has in her favor the precedent of vital importance of the abrogation of article 5 of the treaty of Prague and also the counsel of illustrious publicists, especially Holtzendorff, who, apropos of the abrogation of this article, said that "it is fitting, from the point of view of international law and of peaceful relations between the States, that a stipulation should be abolished at an opportune time in a legal way, when in the passing of time it becomes clear that said stipulation can not be carried into effect and when its lack of determination constitutes only an element of turmoil and disquietude." ("L'Abrogation de L'Article V du Traité De Prague" in the "Revue de Droit International et de Législation Comparée," T. X, 1878, pp. 580-586.) Cf. Stoerk "Option un plebiscit" (Leipzig, 1879, pp. 147-148).

* * * * *

Our chancellery, deferring to international public opinion which places itself each time more in the sense of solidarity of States, and convinced that in our epoch moral, political, and economic solidarity is the primordial law of nations, has manifested its will not to press to the limit the rights conferred upon it by the pact of Ancon over Tacna and Arica on condition that Peru should pave the way for an agreement more advantageous to herself and tending not to wound the national feeling.

The Government of Chile has proposed to her approbation a union of negotiations tending to bind the interests of both countries, and among them figures the celebration of the plebiscite on an equitable

basis in itself and susceptible of returning to Peru the sovereignty of those territories.

Chile has given in this manner, even to the limit her national dignity would allow, overwhelming proofs of her good will.

It is not possible to go further or to appear to favor new propositions. That which our country now awaits is that unequivocal proofs of equal good will shall be given it.

We are sure that this attitude of the Chilean Government carries to all friendly States the conviction of the justice that attends us and of the high spirit of cordiality which animates us in this long and debated question.

The chancellery of Santiago, on proposing such friendly agreements, has set forth in the most eloquent manner its desire to see bound together the vital interests of the two neighboring peoples, called to make straight in harmony the road of international life, which in spite of its ideals and horizons of progress is not exempt from inquietude and anxiety.

ALEJANDRO ALVAREZ,

Counselor of the Minister of Foreign Relations of Chile.

SANTIAGO, November, 1908.

TREATY OF PEACE AND FRIENDSHIP BETWEEN CHILE AND PERU.¹

[Signed at Lima, October 20, 1883.]

The Republic of Chile on the one part, and the Republic of Peru on the other, being desirous of reestablishing friendly relations between the two countries, have resolved to conclude a Treaty of Peace and Friendship, and for that purpose have named as their Plenipotentiaries, that is to say:—

His Excellency the President of the Republic of Chile:—Don Jovino Novoa;

And His Excellency the President of the Republic of Peru: Don Jose Antonio de Lavallo, Minister of Foreign Affairs, and Don Mariano Castro Zalvidar;

Who, having communicated to each other their full powers, and found them to be in good and due form, have agreed upon the following Articles:—

ARTICLE I. Relations of peace and friendship are reestablished between the Republics of Chile and Peru.

II. The Republic of Peru cedes to the Republic of Chile, in perpetuity and unconditionally, the territory of the littoral province of Tarapaca, the boundaries of which are: on the north, the ravine and River Camarones; on the south, the ravine and River Loa; on the east, the Republic of Bolivia; and on the west, the Pacific Ocean.

III. The territory of the provinces of Tacna and Arica, bounded on the north by the River Sama from its rise in the Cordilleras bordering upon Bolivia to where it flows into the sea, on the south by the ravine and the River Camarones, on the east by the Republic of Bolivia, and on the west by the Pacific Ocean, shall remain in the possession of Chile, and subject to Chilean laws and authorities, during the term of ten years, to be reckoned from the ratification of the present Treaty of Peace. At the expiration of that term a *plebiscite* shall, by means of a popular vote, decide whether the territory of the provinces referred to is to remain definitely under the dominion and sovereignty of Chile, or continue to form a part of the Peruvian territory. Whichever of the two countries in whose favor the provinces of Tacna and Arica are to be annexed shall pay to the other 10,000,000 pesos in Chilean silver currency, or Peruvian soles of the same standard and weight.

A special Protocol, which shall be considered as an integral part of the present Treaty, will establish the form in which the *plebiscite* is to take place, and the conditions and periods of payment of the

¹ This translation is taken from British and Foreign State Papers, vol. 74, p. 349.

10,000,000 pesos by the country which remains in possession of the provinces of Tacna and Arica.

IV. In conformity to the provisions of the Supreme Decree of February 9, 1882, by which the Government of Chile ordered the sale of 1,000,000 tons of guano, the net proceeds of that sale, after deducting the expenses and disbursements referred to in Article 13 of the said Decree, shall be equally divided between the Government of Chile and those creditors of Peru whose claims appear to be guaranteed by the guano.

On the sale of the 1,000,000 tons referred to in the preceding paragraph being completed, the Government of Chile shall, as provided for in Article 13, continue to hand over to the Peruvian creditors 50 per cent of the net proceeds of the guano until the debt be extinguished or the guano beds actually worked be exhausted.

The proceeds of the guano beds which may hereafter be discovered in the ceded territories shall belong exclusively to the Government of Chile.

V. Should any guano beds be discovered in the territories which remain under the dominion of Peru, it is agreed that in order to prevent a competition between the Governments of Chile and Peru for the sale of that article, both Governments shall previously agree in determining the proportion and conditions which each of them must observe in disposing of the guano.

VI. The Peruvian creditors, upon whom the benefit referred to in Article IV is conferred, shall submit themselves for the proofs of their securities and other formalities to the rules laid down in the Supreme Decree of February 9, 1882.

VII. The obligation which the Government of Chile accept, in accordance with Article IV, to hand over 50 per cent of the net proceeds of the guano beds actually worked, shall continue to bond them whether the guano be extracted in conformity with the existing contract for the sale of 1,000,000 tons, or take place by virtue of another contract, or on account of the Chilean Government itself.

VIII. Beyond the declarations made in the foregoing Articles, and the obligations the Government of Chile have voluntarily accepted by the Supreme Decree of March 28, 1882, which regulates the nitrate property in Tarapacá, the Government of Chile do not recognise any debts which may affect the new territories they acquire by the present Treaty, whatever may be their nature and origin.

IX. The Islands of Lobos shall continue to be administered by the Government of Chile until the extraction of 1,000,000 tons of guano from the existing beds has been completed in conformity with the stipulations of Articles IV and VII. They shall then be restored to Peru.

X. The Government of Chile declare that they will cede to Peru, from the day on which the ratifications of the present Treaty are constitutionally exchanged, their share of 50 per cent of the proceeds of the guano extracted from the Islands of Lobos.

XI. Until a special Treaty be concluded, commercial relations between the two countries shall be placed on the same footing as they were prior to April 5, 1879.

XII. The indemnities which Peru may owe to Chileans who have suffered injuries through the war shall be submitted either to a

Tribunal of Arbitration or to a Mixed International Commission, appointed immediately after the ratification of the present Treaty, in the form established by the recent conventions concluded between Chile and the Governments of England, France, and Italy.

XIII. The Contracting Governments recognise and accept the validity of all administrative and judicial acts done in obedience to the martial jurisdiction exercised by the Government of Chile during the occupation of Peru.

XIV. The present Treaty shall be ratified, and the ratifications exchanged as soon as possible within the maximum term of 160 days, to be reckoned from this date.

In faith of which the respective Plenipotentiaries have signed the same in duplicate, and affixed thereto their respective seals.

Done at Lima this 20th day of October, in the year of our Lord, 1883.

[L. S.]	MAR. CASTRO ZALVIDAR.
[L. S.]	JOVINO NOVOA.
[L. S.]	J. A. DE LAVALLE.

SUPPLEMENTARY PROTOCOL RESPECTING THE TEMPORARY OCCUPATION OF A PORTION OF PERUVIAN TERRITORY BY CHILEAN TROOPS.¹

[Lima, October 20, 1883.]

In the city of Lima, on October 20, 1883, Mr. Jovino Novona, Minister Plenipotentiary of the Republic of Chile, Mr. Hose Antonio de Lavalle, Minister of Foreign Affairs of Peru, and Mr. Mariano Castro Zalvidar, both plenipotentiaries *ad hoc* of the Government of his Excellency General Miguel Yglesias, having met to conclude the Treaty of Peace between the Republics of Peru and Chile, and acting in virtue of the authority vested in them by their respective Governments, as it appears from their powers and special mandate which have been examined and held sufficient for the negotiation of the Treaty of Peace signed on this date, proceeded to conclude the following Supplementary Protocol to the Treaty of Peace between the Republics of Peru and Chile:

ART. I. Until the Treaty of Peace signed in Lima on this day be made binding by the ratification of it by the Peruvian Congress, the Republic of Chile is authorized to maintain an army of occupation in that part of Peruvian territory where the General-in-chief considers its presence necessary, provided always that the forces which are to compose that army shall not in any way disturb or embarrass the free and full exercise of the jurisdiction appertaining to the Government of Peru.

II. In order to contribute towards the expenses which may be incurred by the Republic of Chile in maintaining the army of occupation, the Government of Peru shall, from the date of this Protocol, pay to the General-in-chief of those forces the sum of 300,000 soles per month, which sum shall be deducted as the first charge from the national revenue of Peru.

¹ This translation is taken from British and Foreign State Papers, vol. 74, p. 352.

III. The provisions and equipments of whatever kind which the Government of Chile may send to their army while the occupation lasts shall pass through the custom houses of Peru free of custom or municipal duties, and their clearance shall be effected without any formality other than the production of the manifest, with the permit of the General-in-chief affixed on it.

IV. The headquarters of the army of Chile shall make use of all the telegraphic lines of the State without payment, provided the telegrams are countersigned in the Secretary's office of the General-in-chief, or signed by the Minister Plenipotentiary of Chile.

V. The headquarters of the army of occupation shall also make use of the railway lines on the same conditions as those observed by the Government of Peru by virtue of the various contracts which it has entered into with the persons or companies that work such lines.

VI. As long as the General-in-chief of the Army of occupation considers it indispensable, the hospitals named "Dos de Mayo" and "Santa Sofia" in this city shall continue to be used by that army, it being permitted to place a military guard in those establishments for their protection and police.

In witness whereof the above-mentioned Plenipotentiaries have signed the present Protocol, in duplicate, and sealed it with their respective seals.

[L. S.]	JOVINO NOVOA.
[L. S.]	J. A. DE LAVALLE.
[L. S.]	MAR. CASTRO ZALVIDAR.

ABSTRACT FROM
“ROSE BOOK” OF CHILE

PARALLEL STUDY

BY
BAILEY WILLIS

PARALLEL STUDY OF THE ARGUMENTS OF CHILE AND PERU ON THE QUESTION OF TACNA AND ARICA.

INTRODUCTORY NOTE.

The discussion from which this parallel abstract is made arose on the occasion of the Treaty of Peace between Bolivia and Chile in October, 1904.¹ The second clause of that treaty established a demarcation of the frontiers, including in the north and south line the boundaries of Tacna and Arica. The third clause proposed the construction of a railroad at the expense of the Chilean Government to run from the port of Arica to La Paz. Peru protested against the "acts of sovereignty" implied in these articles, and the accompanying interchange of diplomatic discussion followed.²

Subjects of discussion.

Rights of Peru and Chile in Tacna and Arica.

Limitations of Chilean authority.

Conditions which should govern the holding of a plebiscite under Article III of the Treaty of Ancon.

*Article III of the Treaty of Ancon.*³

"El territorio de las provincias de Tacna y Arica [gives boundaries] continuará poseído por Chile y sujeto á la legislación y autoridades chilenas durante el término de diez años contados desde que se ratifique el presente tratado de país. Espirado este plazo, un plebiscito decidirá en votación popular si el territorio de las provincias referidas queda definitivamente del dominio y soberanía de Chile, ó si continúa siendo parte del territorio peruano. Aquel de los dos países á cuyo favor queden anexadas las provincias de Tacna y Arica, pagará al otro diez millones de pesos, moneda chilena de plata ó soles peruanos de igual ley y peso que aquélla."

"The territory of the Provinces of Tacna and Arica * * * will continue in the possession of Chile and subject to Chilean legislation and authorities during the term of ten years reckoned from the ratification of the present treaty of peace. This term having expired, a plebiscite shall decide by popular vote whether the territory of the Provinces referred to remains finally under the dominion and sovereignty of Chile, or continues to be part of the Peruvian territory. That one of the two countries in whose favor the Provinces of Tacna and Arica remain annexed shall pay to the other ten million pesos in Chilean silver or Peruvian soles equal to them in standard and weight."

¹ Boletín Mensual, Bureau of American Republics, vol. 20, June, 1905, pp. 16-21.

² Ministerio de Relaciones Exteriores de Chile: Comunicaciones cambiadas entre las Cancillerías de Chile y Peru sobre la cuestión de Tacna y Arica. (1905-1908.) Santiago de Chile, Imprenta Barcelona, 1908.

³ Ibid., pp. 233, 234.

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 - IV. Response of Chile, insisting on his position and acknowledging acceptance of invitation. Santiago, June 5, 1905, pp. 46-47. (*Infra*, p. 73.)
 - V. Confidential communication from the Chilean Minister of Foreign Affairs to the Special Envoy of Peru, Sr. Seoane. Santiago, March 25, 1908, pp. 48-67. (*Infra*, p. 74.)
 - VI. Response of the Peruvian Envoy. Legación del Peru en Chile. Santiago, May 8, 1908, pp. 68-119. (*Infra*, p. 74.)
- B. Observaciones á la Nota del Excmo. Sr. Seoane by Alejandro Alvarez, consultor letrado del Ministerio de Rel. Extrs. de Chile. Santiago, November, 1908, pp. 122-227. (*Infra*, p. 80.)

A. DIPLOMATIC EXCHANGES BETWEEN CHILE AND PERU ON THE QUESTION OF TACNA AND ARICA, 1905-1908.

- I. *Abstract of Protest addressed by the Minister of Peru to him of Chile with reference to acts of sovereignty proposed by Chile in the treaty of peace between Chile and Bolivia. Lima. February 18, 1905.*
- II. *Abstract of Response of the Minister of Chile to him of Peru. Santiago, March 15, 1905.*

PERU.

Article 2 of the treaty between Bolivia and Chile, defining boundaries in part of Tacna and Arica, and Article 3, providing for construction of the railway from Arica to La Paz, oblige the Government of Peru to protest on the ground that these are "acts of dominion (authority) in the full exercise of possession and sovereignty, which according to indisputable international and civil right (law) belong only to the master and overlord (senor y dueno) and not to the possessor and mere occupant, which is the condition of Chile in the provinces of Tacna and Arica" (pp. 8 and 10).

CHILE.

Quotes the Peruvian protest as given in parallel column and says: "It is not difficult to demonstrate that this interpretation can not be reconciled either with the letter or the spirit of the treaty.

"In fact, your Exc. is aware that a section of territory belongs to that State, which with sufficient title has the power to occupy it and subject it to its authority and laws, and, since Article III of said Treaty (of Ancon) establishes that the territory of the provinces of Tacna and Arica 'shall continue possess by Chile and subject to the legislation and authorities of Chile,' it is evident that Peru ceded to Chile the full and absolute sovereignty over these provinces, without any limitation whatever in regard to its *exercise*, and only limited in regard to its *duration* by the event of plebiscite, which is to be held after the lapse of ten years, to be counted from the ratification of the Treaty, as it declares." (Pp. 21-22.)

Peru, in continuing her protest, calls attention to the recognition of her rights over Tacna and Arica by Bolivia, as in the treaty between Peru and Bolivia of September, 1902, in which occurs the clause: "The High Contracting Parties agree equally to proceed * * * to the demarcation of the line which separates the provinces of Tacna and Arica from the Bolivian province of Carangas, immediately after these shall again be (literally return to be, 'vuelvan á estar') under the sovereignty of Peru" (p. 9).

Peru continues: "These being the facts established by the treaty of Ancon, they can not be modified or affected by agreement or stipulations in which Peru has not taken part.

The agreements between Bolivia and Chile could be binding only if they were made with the consent of Peru, or if the plebiscite should have resulted in favor of Chile. Neither of these things being true, Peru declares that she does not accept or recognize these agreements in any form or time and that they can not modify the legal condition of the territories of Tacna and Arica," in respect to which Peru continues to be owner of the title (dueno del dominio) and Chile the mere occupant and tenant, whose legal term had expired 10 years ago, in which interval the plebiscite should have been carried out (pp. 10-11).

Peru maintains (p. 12) that the question of Tacna and Arica is an international affair, governed by a treaty which lays obligations upon the nations that ar-

Chile seizes upon the final phrase "*immediately after these (territories) shall return to be under the sovereignty of Peru*" and construes it into an express recognition by Peru of the fact that they are *not* under the sovereignty of Peru, which is equivalent to a recognition that sovereignty is exercised by Chile (p. 25).

Chile replies (p. 25) to Peru's claim that Peru has retained dominion over Tacna and Arica by stating that: "The traditional doctrine of dominion and property which a State exercises over the territory subject to its jurisdiction tends to disappear (*tiende á desaparecer*) absolutely from modern international law, and there is to be considered only the civil law, which does not govern the relations between States. Furthermore, even within that doctrine (international law) it is well known that 'to the territorial sovereignty belongs exclusively the authority over all parts of its possessions; and from this point of view only, without reference to the international situation of the State, can it be said that it is proprietor of its territory'" (p. 26).

Chile does not reply directly to this point, except in so far as the discussion of precedents, given below, may be construed as an answer.

ranged it and sealed it with their public faith. It is subject to the rules of justice and to the imperative respect due to treaties.
* * *

Peru argues:

It is inconceivable that the provisions of the treaty of Ancon should not be complied with or that one of the parties thereto should make agreements with a third, which must necessarily be subject to the final condition of those territories, which is to be determined by the plebiscite.

The situation of Tacna and Arica is unique, claims Peru (p. 14), since there are no precedents for the case of a territory subject to a plebiscite in accordance with a public and obligatory treaty between two countries, but remaining in fact in the possession of one of them after the termination of the period fixed for the expression of the popular will.

Peru closes by insisting that the treaty of peace between Chile and Bolivia can not modify the treaty of Ancon or in any way control Peru or affect her rights in regard to Tacna and Arica.

Chile professes to regard the provision for a plebiscite as a mere formality designed to sanction an annexation which was already accomplished, as during the French Revolution, or to extenuate an annexation agreed to beforehand, as has occurred in the nineteenth century. "The result, naturally, has always been favorable to the country which annexed."

Chile cites the treaty of Prague, Aug. 23, 1886, between Prussia and Austria, which stipulated that there should be a plebiscite in favor of the Danish population of Schleswig, but which has remained without effect because the Austrian Government recognized the annexation as an accomplished fact (pp. 28-29).

Chile concludes by asserting her right to execute acts of dominion and sovereignty over Tacna and Arica and to consider them an integral part of Chilean territory, so long as a plebiscite shall not have determined their future state (pp. 30-31).

Finally Chile invites Peru to seek to come to an agreement which shall be based on the common interests and needs of both Republics (p. 31).

III. *Second Communication from Peru to Chile, dated Lima, April 25, 1905.*

Maintains that sovereignty (such as Chile claims over Tacna and Arica) is inconsistent with a provisional and temporary control; also that the terms of the

IV. *Response of Chile, dated Santiago, June 5, 1905.*

Chile responds briefly, maintaining that the interpretations she has previously given are in accord with international law and follow the practice of European nations.

treaty of Ancon are clear and free from any uncertainty. In that treaty it was expressly agreed that the possession (of Tacna and Arica by Chile) should continue for a definite term, but the sovereignty and dominion were not ceded. The cession of sovereignty was carefully stipulated in the case of Tarapacá, but was reserved in the case of Tacna and Arica, pending the result of the plebiscite (p. 37).

Rejecting the insinuation of Chile that the date of the plebiscite was not fixed by the treaty was fixed by the requirement that it should be held at the end of 10 years counted from the ratification of the treaty, i. e., from March 28, 1884. This was the understanding at the time the treaty was negotiated and approved, and it has invariably been recognized by the Chilean authorities in subsequent discussion.

Peru reviews the history of the negotiations and reiterates the terms of the treaty of Ancon and closes by accepting the invitation to negotiate its execution.

VI. *Response of Sr. Seoane for Peru to Num. 3, Santiago, May 8, 1908.*

Acknowledging diplomatically the courtesy and expressions of good will of Chile and reciprocating the latter, Peru enumerates the five proposals stated in Chile's confidential communication and states that they constitute a "heterogeneous" series of propositions which Peru cannot consider in this connection, because they are in no sense related to the purely political question of the plebiscite which Peru desires to take up directly.

While Peru recognizes the importance of the proposed measures for reciprocal customs ar-

V. "Num. 3—Confidential"—*Ministre del Rel. Exteriores (de Chile), Santiago, March 25, 1908.*

The Minister of Foreign Affairs for Chile addresses the plenipotentiary of Peru in Santiago, evidently after certain oral negotiations have taken place. He says in effect (pp. 48-55):

The Peruvian Minister indicated in his first interview that he wished to proceed at once to the consideration of the Tacna-Arica question, but he of Chile proposed rather to formulate certain distinct proposals designed to develop amicable relations between Peru and Chile. It was true the Peruvian Minister had not agreed to this method of ap-

rangements, for a merchant marine, and for a connecting railroad, she is of the opinion that there is no good ground for discussing them in connection with the matter of the definite possession of Tacna and Arica.

Peru solemnly assures Chile that among the people of Tacna and Arica the sentiment of nationality is conserved and transmitted as vehemently as in the epoch of glory and sacrifice and that all sections of the "Patria Peruana" respond in kind. Once the plebiscite shall have been consummated, there need be no fear that the disappointed country would remain ill disposed, for the arrangement of peoples shall correspond to the true suffrage, not to the pretender Republic.

However, on the one point of the proposed increase of the indemnity to be paid to the other country by the one which shall gain the final sovereignty, Peru makes the fundamental observation that the discussion with which he is charged by his Government contemplates fulfillment of Article III of the treaty of peace, not the modification thereof (p. 77).

Peru would depart from the conditions of the agreement of Ancon only to insure the immediate and definite reincorporation of the Peruvian Provinces of Tacna and Arica with the national territory.

Peru has faith in the outcome of a plebiscite conducted in accordance with her judicial institutions, whereas the attitude of Chile is a confession of the sterility of those efforts which have been made to "Chilenize" the population (p. 78).

proach to the vital question, yet he of Chile might attribute this to the fact that the proposals had been vague and not clearly understood, therefore he formulates them as follows:

1. Arrangement of a commercial convention which shall concede free or reciprocal customs duties to certain elected products of each of the two countries which are consumed in the other.

2. Celebration of an agreement for the development of the merchant marine and the establishment of a steamship line to be paid for or subventioned by the two Governments to develop the commerce of their coasts.

3. Association of the two Governments to carry out by means of their resources and their credit the work of uniting the capitals of Santiago and Lima by a railroad.

4. Arrangement of a protocol which shall establish the form of the plebiscite provided for to determine definitely the nationality of Tacna and Arica.

5. Agreement to increase the amount of the indemnity which shall be paid to the other country by the one which acquires definite sovereignty over this territory.

Peru therefore definitely declines to consider the proposal (to increase the amount of the indemnity).

Peru then takes up three points of the Chilean claims: I. The pretended cession of sovereignty (*la cesión simulada*); II. The direction of the plebiscite; and III. The qualifications of voters (*votantes*).

I.

With regard to the cession of sovereignty. I. (pp. 80-94).

(a) In ancient legislation the substantial and characteristic element of a plebiscite consisted in the will of the people as an expression of sovereignty.

(b) The French Revolution of 1789 condemned conquest by force of arms and reestablished that democratic practice as the only justifiable basis of changes in the existence of States.

(c) Transferred thus to the field of international relations, the plebiscites, whether in favor of France as in the case of Avignon in 1791, or in favor of the unity of Italy in 1818, and all others invariably invoked the decision of the people as the fundamental and judicial title. There has been fraud and abuse by force, but fraud is not a legal factor; it annuls.

(d) After repeating the distinction between the absolute cession of Tarapacá and the provisional and temporary relinquishment of Tacna and Arica by the treaty of Ancon, Peru cites four cases in which the ceding nation (*nación cesionista*) has stipulated for a plebiscite, namely (pp. 83-84), the treaty of Turin, March, 1860; the treaty of Prague, August, 1866; the sequel to the treaty of Prague agreed to at

Chile then proceeds to argue as follows:

He is confident that Peru can not fail to recognize in these proposals as a whole the proof of Chile's desire to insure the most cordial relations with Peru, and Peru can not but be persuaded at least that it is plainly desirable to give to the negotiations in hand all of the amplitude which Chile has indicated. Should they (the negotiations) be reduced to the mere organization of the plebiscite, it might well follow that the country which was disappointed in its expectations of success (*triunfo*) would remain ill disposed, for a time at least, to unite in that friendship which is desired.

"Let us dispose of all causes of eventual uncertainty. Greater confidence, without doubt, will be inspired by negotiations whose purpose is to eliminate existing difficulties and at the same time give pledges of future cordiality."

Chile argues further that a prior agreement in regard to the other matters he proposes will have a beneficial effect on the plebiscite, and this part of his communication closes with the suggestion that "This negotiation as a whole, since it consists of diverse elements which complete and compensate one another, should be treated altogether as a indivisible unit."

Chile then proceeds to discuss the several proposals (pp. 56-66). He passes lightly over the suggestions for a customs agreement, a mercantile marine, and a connecting railway. He introduces the discussion of the protocol in

Vienna on the following day, and in October, 1866, also; and the treaty of Paris, August, 1877.

In each of these cases the ceding power *renounced* claim to sovereignty, whereas in the treaty of Ancon, Peru did not give up her sovereignty over Tacna and Arica, and therefore these cases do not offer parallel conditions (p. 87).

Various negotiations are cited (p. 87-94), to prove that Peru has never ceded her sovereignty over Tacna and Arica, and the discussion closes (p. 94) with the statement that the claim to cession (*cesion simulada*) or conquest should therefore be put aside absolutely.

II.

Continuing his argument under II, Peru takes up the claim of Chile to preside over the plebiscite because she exercises sovereignty over Tacna and Arica. He denies the justice of this claim:

"What is Chile's title to sovereignty?" It rests solely in the treaty of 1883. That treaty provided that the territory should continue to be possessed by Chile during the term of 10 years which ended March 28, 1894. Once that term expired, a plebiscite should decide by popular vote. The termination of the period carried with it that of the conventional right (of possession). Conclusively, then, the precarious sovereignty of Chile ceased in Tacna and Arica (p. 97).

There follows a recital of various expedients proposed by Peru in 1894 to avoid the disagreement which exists.

Peru recites the precedents affecting the direction of plebiscites in 1860, 1866, and 1877, and draws the conclusion that they

regard to the plebiscite by referring to the withdrawal of the Peruvian Legation in 1901 and the invitation extended by Chile in 1905 for a resumption of relations.

He then comes to the point (p. 60).

The treaty of 1883 did not omit a definition of the conditions which should govern the holding of the plebiscite because of oversight but rather because of the implicit recognition that the proceeding agreed to could *not be any other than that of the plebiscites comprised in the history of international law.*

Chile, however, is not disposed to stress the rights which Article III of the treaty gives her, nor to hold exactly to the terms of the law as laid down by publicists and diplomatic precedents, provided always that Peru will renounce extreme pretensions, which would certainly frustrate the purpose of the negotiations.

Chile argues (pp. 61-62) that there is a difference between the right to vote in this matter of *international* import. "There is, therefore," says Chile, "no doubt but that there shall be called to exercise the right of suffrage all the competent inhabitants of the

agree in the one particular, the *modus operandi*, according to which it would follow that only residents of Tacna and Arica (tacneños y ariqueños) could serve as officials. Holding that Chile's continuing in control has been illegal since March 28, 1894, Peru denies her any right to the presidency of the plebiscite.

"Rights do not emanate from that which is illegal."

Resting her case in the fundamental principles of justice, Peru draws the logical conclusion that both Republics must have identical rights of intervention and identical positive securities, to the end that the plebiscite shall express, according to the testimony of both, the true verdict of the people (p. 104).

territory—not only those nationals of one or the other country concerned who may have established their residence in the territory and who are free of all disabilities but also those resident aliens (*extranjeros*) who are in the same conditions."

"The preference" (*voluntad*) of the aliens should be consulted in the plebiscite as much because it is implicitly recognized in the treaty in the phrase "popular vote" (*votación popular*) as because it is neither equitable nor reasonable to deprive them of participation in an affair (*consulta*) which shall determine the fate of the territory where they have established their interests, have raised their families, and have contributed in a very important degree to prosperity by their fruitful and persevering labor.

Furthermore, Chile claims that, inasmuch as she is exercising sovereignty in Tacna and Arica, it is her exclusive duty to appoint the personnel which shall preside over the election, equally in the registration of voters as in receiving the votes.

III.

Regarding the right to vote, Peru holds that it pertains solely to native sons (*regnicolas*). Aliens, so long as they are not naturalized, fail to secure political rights, and their personal status remains unaffected by any change of territorial dominion.

The suffrage in the case of the plebiscite is of a special character, transcending the participation of the citizen in the direction of public affairs, since it shall determine the sovereignty that shall rule the territory. The vote should be denied to the co-nationals (Peruvians) not born in Tacna and Ar-

The discussion of this item concludes with the expression that Peru will assuredly not object to giving representation to Peruv-

ica. How much more evidently then to aliens. To grant the latter the vote would be to give them equal rights with the natives (*duenos*) to empower them to denationalize the citizens and to violate that neutrality which is imposed upon them by law in case of any international dispute.

ian nationals and likewise to citizens of other nations.

These points are sustained by quotations from Chilean authorities (pp. 107-112) and by precedents drawn from the execution of the treaties of Turin, Vienna, and Paris (pp. 112-114.)

Finally Peru recites Chile's statement that the negotiations of the treaty of Ancon could have had no other proceedings in mind for the plebiscite than that of those plebiscites which have become incorporated in the history of international law, and, putting aside as untenable the idea that the Government of Chile under President Montt could have designs to transform the proceedings into a burlesque by fraud or force, Peru points out that the only precedents are those of Nice, of Savoy, of the Italian Provinces, and of the Island of St. Bartholomew, in which rules were laid down in advance by the local authorities, as has been set forth in detail in the argument (pp. 100-101 ante). On this basis Peru agrees with Chile on this point.

Peru closes by inviting Chile to continue the conferences till an agreement shall be reached, by applying the precepts of diplomatic antecedents according to law and justice to the disputed clauses of the Billinghamst-La Torre protocol (p. 118).

Referring to the fifth article of the Chilean proposals, Chile suggests that the amount to be paid to the country which shall lose the sovereignty of Tacna and Arica shall be fixed between two and three millions of pounds sterling. She argues that this payment should be combined with that of the indebtedness for the international railroad and that the matter would thus be robbed of the character of an indemnity. The result would be a solution of the problem with the least possible bitterness.

Chile concludes with the expression of the hope that Peru will agree that the group of proposals is well calculated to settle the difficulties between the two countries and to reestablish cordial relations between them.

**B. OBSERVATIONS ON THE NOTE OF H. E. SR. SEOANE OF
MAY 8, 1908, BY ALEJANDRO ALVAREZ, COUNSELLOR,
FOREIGN OFFICE, CHILE.**

(Pp. 123-227.)

(For the note of Sr. Seoane see preceding excerpts.)

The "Observations" introduce the subject by a résumé of the historical facts, beginning with the treaty of Ancon, October, 1883. With reference to the third article the Observations state:

"The provinces of Tacna and Arica remained subject to our (Chilean) sovereignty, and consequently to our legislation and authority, until a plebiscite, which should be celebrated 10 years after the ratification of the treaty, should decide to which of the two nations they would definitely belong.

* * * * *

"Shortly after the expiration of the ten-year period both countries began negotiations to arrive at an agreement over the terms of the plebiscite, but without result."

In 1901 Peru withdrew her diplomatic representatives from Chile and sent a communication to foreign chancelleries charging Chile with having refused to comply with the treaty of Ancon.

The chancellery of Santiago, which throughout the negotiations had with the highest purpose of conciliation sought to arrive at an amicable agreement with Peru, invited her on March 15, 1905, to reopen diplomatic relations. In order to avoid a repetition of futile negotiations, the invitation was issued with the object of procuring an agreement which should be based on the interests and advantages of both Republics since "on the ground, which is that of the actual interests of the peoples, the agreement between Chile and Peru would be immediate, ample, and enduring."

The Government of Peru having accepted the invitation and accredited its minister plenipotentiary, there followed the exchange of notes of February 18 and March 15, 1905, and of March 25 and May 8, 1908.

PERU.

Peru on her part alleges (p. 128):

1. That the plebiscites which are recorded in history are not to be interpreted in the manner claimed by Chile.

CHILE.

On the part of Chile the controversy came to rest on the following bases (pp. 126-127):

1. The negotiations of the treaty of Ancon, in stipulating that Tacna and Arica should remain under the sovereignty of Chile subject to a plebiscite which later should decide the final nationality of these territories, gave to this proceeding the value and

scope attributable to it both by the history of diplomacy and by international practice. As the statesmen they were, they adopted the formula of the plebiscite, not in its theoretical or judicial meaning, but saw rather in it the proceeding best adapted to the difficult conditions through which the Government of Peru was passing; that is to say, a practical and honorable formula to facilitate the annexation of those territories and make it acceptable to the people of the vanquished state (Peru).

2. The Government of Chile, in its desire to arrive at an amicable solution with Peru, has constantly manifested throughout the negotiations its desire not to push to an extreme the exercise of those rights which were in fact conferred upon it by the treaty of Ancon, provided always that the Government of Peru should show itself disposed to agree to an outcome which should solidly and permanently assure peace and reestablish cordial relations between the two countries.

3. In the judgment of Chile the best method to secure these results consists in making agreements which may consult the mutual political and economic interests. One of these agreements is the celebration of the plebiscite upon bases which shall be more equitable than those proposed by Peru, designed to insure the universality of the suffrage and the impartiality of the count, and which may, therefore, result in the triumph of Peru, if such shall be the decision of the popular vote.

2. That, assuming that the claim of Chile as to the interpretation of historical precedents were correct, the plebiscite provided for by the treaty of Ancon was of very different character from those which had been agreed to up to that time; and that in consequence it must be lived up to rigorously. Peru understands that this means that Chile should not preside over the plebiscite and that the right of suffrage should belong only to the original Peruvians of Tacna and Arica. These propositions are equivalent to the assumption that a mere formula, which assured in advance the triumph of Peru, was agreed to (by the treaty of Ancon).

3. That since March 28, 1894, the date on which the plebiscite should have been held, our country (Chile) has ceased to exercise sovereignty over Tacna and Arica and has continued to hold the territory unjustly.

The advocate of Chile then proceeds to consider each of the three points which he regards as the basis of discussion between Chile and Peru.

I.

The discussion of the purpose of a plebiscite in the light of historical precedents occupies pages 129-149. It is introduced by a quotation from Sr. L. A. Vergara, Minister of Foreign Affairs for Chile, who, in his note of March 15, 1905, re Tacna and Arica, took the ground stated above as the Chilean contention; namely, that all the international plebiscites held during the last two centuries have been nothing more than a means of sanctioning a conquest already accomplished or of facilitating an annexation recorded beforehand.

The idea of a plebiscite originated during the French Revolution as a consequence of the principle of popular sovereignty.

The National Convention of 1792, nevertheless, sought to effect a compromise between the dogma of sovereignty and the necessity of extending the frontiers of France. All other principles, whatever their importance, were subordinated to the requirements of foreign politics. Various proceedings were employed according to circumstances. In case the region to be annexed desired to unite with France, the plebiscite was understood to be a mere formality; and in the contrary case the popular will was coerced, if necessary, by force.

The annexation of Nice and Savoy to France was an example of the former class. It was not a conquest, but an act of fraternity by which two brother peoples were united in a single state.

The Provinces on the left bank of the Rhine, and above all Belgium, presented examples of the second class. France did not hesitate to occupy these countries by armed forces, and French officials resorted to extreme measures to falsify the popular vote.

"Thus the lesson taught by those plebiscites which were held during the French Revolution is suggestive."

"The application of the doctrine of popular will can not be loyally followed, especially after a war of conquest, when the purposes of the conqueror are opposed to it." Carnot, in 1793, summed up the principle which is superior to the popular will; namely, "to prevent that another people shall lay down the law for us."

The plebiscite fell into disuse until Napoleon III revived it to justify the coup d'état of 1852, and induced some other governments to adopt it in certain cases.

The plebiscites already enumerated and others are then discussed separately (pp. 134 et sequi). They are: The union of the Italian States; the annexation of Nice and Savoy to France; the annexation of Lombardy and Venice to Italy; the annexation of Schleswig to Prussia; and the retrocession of the island of Saint Bartholomew to France.

After reciting the history of Schleswig, including a quotation from Bismarck to the effect that it was useless to consult the popular will since the security of frontiers could not be permitted to depend on a popular vote, the Chilean advocate lays stress upon the example of Prussia and Austria as of transcendental importance in international affairs.

Thus the Chilean advocate deduces from these precedents four conclusions (pp. 143-144):

- (a) The proceeding has been purely *pro forma*;
- (b) The conduct of the plebiscite has been under the exclusive direction of the power that exercised sovereignty over the ceded territory;
- (c) The suffrage was confined to nationals (regnicolas);
- (d) In those cases where it was known beforehand that the plebiscite would give an unfavorable result, it was not held.

II.

The advocate of Chile proceeds to argue that the plebiscite, which should eventually determine the nationality of Tacna and Arica, was agreed to only in the light of historical precedents (whose bearing has been summed up in what precedes) and that on the part of Chile it was a measure proposed simply to permit the Peruvian people to accept the practical cession of those territories without too gravely wounding their patriotic feeling (pp. 150-160).

The argument is based on the demands of Chile in the first and subsequent negotiations; 1880-1883; and also on the conditions surrounding the negotiations themselves and the public sentiment in Chile at the time.

At the first futile conferences, held on board the *Lackawanna*, October, 1880, Chile demanded the cession of Tarapaca, and the retention of Moquegua, Tacna, and Arica. Two years later, when Lima had been occupied, the Peruvian army dispersed, and the Peruvian Government overthrown, Chile was in a position reasonably to impose more rigorous conditions of peace. The cession of Tacna and Arica was required as a *sine qua non* during the negotiations from 1881 to 1883.

When Gen. Iglesias had been invested by the assembly of Cajamarca with the powers of president, his aims coincided with those of Chile in so far as they had to do with the establishment of an enduring peace, involving the cession of territory, in the manner that would assure to the new President of Peru the support of his fellow citizens. The difficulty of reconciling the requirements imposed by Chile with the sensibilities of the Peruvians was met by the expedient of the plebiscite. Thus the public in Peru might entertain the hope that Tacna and Arica would remain only temporarily under the sovereignty of Chile, whereas the Government of Chile calculated that 10 years would suffice to convince the Peruvians that the Provinces should remain a part of Chile, "without a plebiscite or through a mere formality" (p. 156).

"It is, therefore, not, as Peru now maintains, the fact that her resistance to the cession of Tacna and Arica caused Chile to desist from her proposal of annexation; nor did Chile agree in all seriousness to a plebiscite, without regard to the diplomatic precedents. It would have been senseless had the Chilean negotiators, who regarded these territories as an indispensable pledge of future peace, renounced the proposal to acquire sovereignty over them simply because of the purely passive resistance of the Peruvian representatives."

Further support for these arguments is found in the treaty with Bolivia, signed April 4, 1884, by which Bolivia surrendered to Chile

her coastal Provinces, as was necessary in order that the Chilean territory, including Tacna and Arica, should be contiguous.

In support of the argument that the plebiscite was accepted in its historical and purely formal intent, attention is called to the similarity of phraseology between Article III of the treaty of Ancon and the terms of the treaties of Turin, 1860, and of Paris, 1877 (p. 160).

After reciting evidence of the care with which the treaty of Ancon was drawn and thus excluding the idea that there could have been any oversight, the conclusion is reached that the postponement of a decision as to the conditions which should govern the holding of the plebiscite was due to a deliberate recognition of the purely formal character of the provision (p. 163).

Don Luis Aldunate, one of the negotiators of peace, in his character of Minister of Foreign Affairs, is quoted to the effect that "at that time (1883) no one doubted that to give Chile possession of those territories for 10 years was synonymous with giving her sovereignty over them."¹

III.

The third point at issue is the question of the right of Chile to continue to exercise sovereignty over Tacna and Arica from and after the expiration of the term of 10 years, which came to an end in March, 1894.

The advocate of Chile does not, however, proceed at once to a consideration of that issue, but repeats in the form of a criticism of the views of Sr. Seoane the Chilean interpretation of the antecedents and purpose of the proposed plebiscite (pp. 166-172).

He then takes up the question of sovereignty, stating in effect (p. 172): The plenipotentiary of Peru (Sr. Seoane) attributes such importance of the term of 10 years, as stipulated in the treaty of 1883, that he would maintain that since March, 1894, our country has ceased to be sovereign over Tacna and Arica and that sovereignty has passed by full right to Peru.

This claim has for its sole object the purpose of furnishing a basis for the thesis * * * that our country (Chile), since it does not exercise sovereignty over Tacna and Arica, can not preside over the operation of the plebiscite. The term fixed by the treaty of 1883 does not limit the period of Chilean sovereignty, but rather fixes a minimum of 10 years, within which the popular vote could not be taken.

Here the advocate of Chile repeats the arguments based on the phrases of Article III, "the plebiscite shall decide whether the territory shall remain *definitely* under the dominion of Chile or *continue* to be part of the territory of Peru." He claims that Peru ceded the absolute sovereignty without any limitation in regard to its *exercise* and limited in duration only in the event that a plebiscite should decide that it must be returned to Peru.

It follows in the judgment of the advocate that the expiration of the 10-year term did not in any way terminate the sovereignty of Chile over Tacna and Arica nor reestablish that of Peru. The continuation of Chile in authority is therefore far from being illegal (pp. 176-178).

¹ Los tratados de 1883-84, Santiago, 1900, p. 215.

IV.

The advocate for Chile reviews the argument for a plebiscite according to the Chilean program and expatiates on the cordial good will of Chile toward Peru (pp. 178-186).

"The group of arguments thus far presented demonstrates patently the right which Chile possesses to maintain that the Provinces of Tacna and Arica were ceded to her by the agreement of Ancon; that the stipulation of the plebiscite was a mere form; and that consequently, like all others which have been carried out up to the present, it should be held under conditions which may yield a result favorable to annexation."

Proceeding from this basis, and in conformity with the principles of common law (*derecho público*) and with diplomatic precedents, the act (plebiscite), in case it be held, should be carried out under the exclusive direction of the Chilean authorities; and in order to achieve a favorable result the right to vote should belong only to Chileans who reside in Tacna and Arica, because they are nationals of the country which exercises sovereignty and are disposed to vote in favor of annexation.

Nevertheless, the Government of Chile, aspiring to rise to the same level of conduct as that adopted by the European nations with their rivals in armed combat—that is to say, seeking to cause the past to be forgotten and future interests to be unified—has abstained carefully, since the treaty of 1883, from alleging that that agreement involved a cession of territory; and, without abandoning in the least its purpose of incorporating Tacna and Arica under its sovereignty, has sought to secure this result by means entirely consistent with tranquillity and friendship.

In support of this latter statement of friendly purpose the advocate of Chile recites the offers of Chile in 1888, 1889, and 1890 to pay Peru 4,000,000 pesos more than the sum agreed to, in case Peru would consent to the immediate annexation of Tacna and Arica, and argues that Chile did not object to enter into negotiations for the celebration of the plebiscite, provided that it be held under those conditions in which she might have complete faith of success, yet which might include the possibility of a triumph for Peru.

Those conditions should be that the plebiscite should not be held in disregard (*desmedro*) of the authority of Chile, and that the vote should, in conformity with the Treaty of Ancon, be truly popular; that is, that the right of suffrage should be accorded not only to resident Chileans and Peruvians, but also to foreigners who had established themselves there.

Chile has further refrained from raising any question regarding the majority vote which should be necessary to return the Provinces to Peru. In this matter the situation of the two countries is radically different: Chile exercises full sovereignty over the country and Peru has to her account nothing more than a mere expectation of recovering it. Chile, therefore, has a perfect right to require that a mere majority should not have the power to deprive her of the sovereignty, but that a much higher proportion of the votes should be required. On this point reference is made to Lieber: "*De la valeur des plébiscites dans le droit international*" (*Revue de Droit International et*

de Législation Comparée, T. III, 1871, p. 173) and also to Thudichum, in *Revue de Droit International et Législation Comparée*, T. II, 1870, pp. 771-772.

Referring further to the liberal attitude taken by Chile toward Peru in the payment of claims and cancellation of debts, the argument along these lines closes with the expression of Chile's aspiration to secure in the north a neighbor who will not be a persistent enemy but rather a sister nation which will know how to forget the events of the past in order to enter upon the great political and economic problems which are of interest to both.

V.

In this section of the observations on the note of Sr. Seoane the Chilean advocate reviews the attitude of Peru unfavorably in contrast to that of Chile; repeats the proposals for an agreement on the basis of mutual interests not related to the treaty of Ancon; restates the conditions under which the plebiscite should be held, if at all; and discusses again the question of suffrage (pp. 186-210).

The restatement of the argument, though accompanied by reflections on the positions taken by Peru and on the arguments presented by Sr. Seoane, does not present any new principles. It may be noted, however, that Chile urges that the right to vote in the plebiscite should be extended to foreigners (i. e., to other nationals than Chileans and Peruvians), because foreigners would be neutral and best fitted to estimate which of the two countries ought finally to exercise sovereignty over the territory. (p. 209).

Commenting upon the suggestion of Sr. Seoane that the protocol "Billinghurst-Latorre" should be taken as the basis of a convention over the plebiscite, and refusing absolutely to consider it, the advocate of Chile says (pp. 211-212): "To assume, as is proposed by Sr. Seoane, that the diplomatic precedents of the institution of the plebiscite should be interpreted 'according to principles of law and justice' is equivalent to requiring that these precedents should be regarded, not in the light of diplomatic history, which is the only point of view from which they were regarded by the negotiators of the treaty of Ancon, but rather in a purely ideal sense, which Peru assumes to be favorable to her interests."

VI.

The final section of the "Observations" deals with the state of the negotiations at the time the advocate wrote, 1908, and with the situation arising from the fact that Peru had refused to consider the Chilean proposals.

The attitude of the chancellery of Lima is truly peculiar, inasmuch as it not only declines to take account of the Chilean proposals, but declares it will immediately make them public. It might be inferred that Peru wished to put an end to negotiations with Chile. Chile might, therefore, consider herself freed from all her propositions and recover complete freedom of action; but still persisting in her desire for friendly relations trusts that Peru does not desire to shut the door upon a future solution.

Still, Chile does not wish to pursue sterile negotiations of a more academic than practical character.

Examining the international situation on the assumption that Peru coincides with Chile in desiring an enduring agreement, and assuming also that Chile would not regard the negotiations as closed and the Provinces of Tacna and Arica forfeited to her without other obligation than that she should pay Peru 10,000,000 pesos in silver, there still remain between Chile and Peru directly contradictory interests.

Peru desires to reincorporate these Provinces under her sovereignty and Chile, the actual sovereign, desires that they should remain definitely incorporated in her dominion.

This controversy, considering the bases from which Chile started out in the negotiations and the purpose with which she has pursued them, can not be submitted to arbitration. Although the traditions of Chilean policy and action favor arbitration, her Government does not fall into the error of considering it a panacea for all international conflicts. The matter of Tacna and Arica is one of vital importance, since it concerns the security of her northern frontier and her sovereign rights. Chile can not admit that there is any doubt about her actual dominion over Tacna and Arica or her right as sovereign to preside over the execution of the plebiscite. Therefore these matters can not be arbitrated.

Equally impossible is it to admit that arbitration might decide the extension of the suffrage to Chileans and foreigners, because to do so would be equivalent to the absurd admission that Chile had agreed to a pretence of a plebiscite in favor of Peru.

Chile holds, in fact, that if an arbitrator should intervene, he should be not a judge who would decide according to certain solemn judicial principles (*solemnidades juridicas*) but rather a group of persons well informed in regard to the political conditions (*conveniencias*) of these territories. These persons could not be any others than the inhabitants of Tacna and Arica, including the foreigners, who, as mediators between Chileans and Peruvians, would have the most active interest in weighing the problem without passion, without the distinctions drawn by lawyers and only on the basis of present and future convenience (pp. 212-218).

Inasmuch as the actual conflict, by reason of its origin, antecedents, and character, can not be submitted to the judgment of an arbitral tribunal, there remains but one solution possible.

In accordance with a *strictly judicial judgment* an agreement between the parties to the treaty of 1883 has become impossible, and this impossibility carries with it the abrogation of the particular clause, though not of the whole treaty. This conclusion follows because the clause, in view of its object and the purpose of the negotiators, is not essential to the substance of the treaty. As a result Chile would remain definitely in sovereign possession, with no other obligation than that of paying Peru 10,000,000 pesos.

According to *political criterion* the lapse of time creates, in favor of the country which exercises authority over a territory, a right which becomes established, in course of a period that can not be precisely determined because it varies according to circumstances, and assumes a permanent character. This follows from the very nature

of sovereignty and from the development of interests, which may assume such importance as to constitute an accomplished fact.

If it were not true that the lapse of time confers sovereignty, and if in the name of ideal justice the attempt were made to vindicate all the claims founded in historic rights, it would be necessary to make over the map of the world completely and replace it by one which would assuredly be more artificial and unjust (p. 221).

Precedents for the definite assertion of sovereignty by Chile over Tacna and Arica are found in the cases of the concession given England over Cyprus by Turkey, June 4, 1878, and in the rights given Austria over Bosnia and Herzegovina by article 25 of the treaty of Berlin. Austria's course in gradually consolidating her sovereignty over Bosnia and Herzegovina, and in finally annexing those territories is cited as one which has not gravely preoccupied the attention of the great powers. Nevertheless, Chile does not regard it as a case parallel to that of Tacna and Arica because her rights there include full sovereignty, the question concerns two countries only, and the treaty of 1883 provides for an indemnity.

Finally, looking at the question *as statesmen*, guided by diplomatic precedents and political conditions rather than by rigorous precepts of private rights, Chile may invite Peru to modify the treaty of peace in so far as it concerns the plebiscite, being able to offer her in exchange an adequate indemnity. Precedent for this action may be found in the abrogation of article 5 of the treaty of Prague. On this point Chile quotes Holtzendorf (*Rev. de Droit Intern. et de Lég. Comparée*, T. X, 1878, pp. 580-586). (pp. 223-225.)

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DIPLOMATIC AGENTS AND IMMUNITIES

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PART ONE.

DIPLOMATIC AGENTS.

I. DUTIES OR FUNCTIONS OF DIPLOMATIC AGENTS.

According to Sir Ernest Satow, "diplomatic agents" is "a general term denoting the persons who carry on the political relations of the States which they represent, in conjunction with the minister for Foreign Affairs of the country where they are appointed to reside. They are also styled 'ministres publics' in French."

Satow, *Diplomatic Practice*, vol. 1, p. 173.

"The main duties or functions of permanent diplomatic agents are those of observation, protection, and negotiation. It is the duty of the resident minister to observe and report upon all matters of interest to his Government, to protect by means of his mediation or good offices nationals of his own State against acts of illegality and injustice in the country to which he is sent, and to enter into negotiations for the purpose of settling any outstanding difficulties between his own Government and that to which he is accredited. But he may perform other miscellaneous functions, such as the registration of births, marriages, and deaths of his fellow nationals, the authentication of certain documents, the issuance of passports, etc. In no case should he intervene in the internal affairs of the country by which he has been received."

Hershey, *Essentials of International Public Law*, p. 277.

"The duty of the diplomatic agent is to watch over the maintenance of good relations, to protect the interests of his countrymen, and to report to his Government on all matters of real importance, without being always charged with the conduct of a specific negotiation. At the more important posts, the agent is assisted in furnishing reports of a special character by military, naval, and commercial attachés.

"In addition to the head of the permanent mission, other agents are sometimes deputed for special purposes of a ceremonial character, to represent the Sovereign at a coronation, a royal wedding or funeral, or to invest the foreign Sovereign with a high decoration. It is usual also to appoint special agents for particular objects, such

as the negotiation of commercial treaties, in which case the permanent representative is often joined with the business expert, or to attend conferences on postal and telegraph conventions, questions of hygiene, the protection of literary and artistic property, trade-marks, and patents. Commissioners may also be appointed to regulate boundary questions or other matters requiring adjustment which are outside the scope of the ordinary duties of the permanent diplomatic representative. These persons do not enjoy all the privileges and immunities of diplomatic agents."

Satow, *op. cit.*, vol. 1, p. 174.

"Two different kinds of diplomatic envoys are to be distinguished—namely, such as are sent for political negotiations and such as are sent for the purpose of ceremonial function or notification of changes in the headship. For States very often send special envoys to one another on occasion of coronations, wedding, funerals, jubilees, and the like; and it is also usual to send envoys to announce a fresh accession to the throne. Such envoys ceremonial have the same standing as envoys political for real State negotiations. Among the envoys political, again, two kinds are to be distinguished—namely, first, such as are permanently or temporarily accredited to a State for the purpose of negotiating with such State, and, second, such as are sent to represent the sending State at a Congress or Conference. The latter are not, or need not be, accredited to the State on whose territory the Congress or Conference takes place, but they are, nevertheless, diplomatic envoys, and enjoy all the privileges of such envoys as regards extritoriality and the like which concern the inviolability and safety of their persons and the members of their suites."

Oppenheim, *International Law*, vol. 1, p. 443.

"A distinction must be made between functions of permanent envoys and of envoys for temporary purposes. The functions of the latter, who are either envoys ceremonial or such envoys political as are only temporarily accredited for the purpose of some definite negotiations or as representatives at Congresses and Conferences, are clearly demonstrated by the very purpose of their appointment. But the functions of the permanent envoys demand a closer consideration. These regular functions may be grouped together under the heads of negotiation, observation, and protection. But besides these regular functions a diplomatic envoy may be charged with other and more miscellaneous functions."

Oppenheim, *op. cit.*, vol. 1, p. 453.

"Public political agents are agents sent by one Power to another for political negotiations of different kinds. They may be sent for a permanency or for a limited time only. As they are not invested with diplomatic character, they do not receive a Letter of Credence,

but a letter of recommendation or commission only. They may be sent by one full-sovereign State to another, but also by and to insurgents recognized as a belligerent Power, and by and to States under suzerainty. Public (or secret) political agents without diplomatic character are, in fact, the only means for personal political negotiations with such insurgents and States under suzerainty.

“As regards the position and privileges of such agents, it is obvious that they enjoy neither the position nor the privileges of diplomatic envoys. But, on the other hand, they have a public character, being admitted as public-political agents of a foreign State. They must, therefore, certainly be granted a special protection, but no distinct rules concerning special privileges to be granted to such agents seem to have grown up in practice. Inviolability of their persons and official papers ought to be granted to them.”

Oppenheim, *op. cit.*, vol. 1, p. 509.

II. CLASSIFICATION OF PUBLIC MINISTERS.

In accordance with regulations adopted at the Congress at Vienna (1815), supplemented by those of Aix-la-Chapelle (1818), public ministers are divided into four classes:

1. *Ambassadors, papal legates, and nuncios.*—Only those States with royal honors, namely, empires, kingdoms, grand duchies, the Holy See, and the great republics, such as France, United States, and American republics, are entitled to send and receive ambassadors. Papal envoys are known as nuncios or legates. Ambassadors are deemed to be the personal representatives of the heads of their States, and for this reason enjoy special honors. Their chief privilege is that of negotiating with the head of the State to which they are accredited; but this privilege is of little importance in our day, since nearly all modern States have constitutional governments and transact important foreign business through the secretary of state or minister of foreign affairs. They do not have the right of audience with the sovereign at any or all times, as sometimes erroneously claimed for them.

2. *Envoys and ministers plenipotentiaries accredited to sovereigns.*—This class includes ministers plenipotentiaries and envoys extraordinary. They are not considered to be personal representatives of the heads of their States. Consequently, they do not enjoy all the honors to which ambassadors are entitled, and they have no privilege of dealing with the head of the State personally; but otherwise there is no substantial difference between the first three classes.

3. *Ministers residents accredited to sovereigns.*—Ministers resident enjoy fewer honors and rank beneath ministers of the second

class. They do not enjoy the title "Excellency," as do ambassadors or legates of a higher rank, but otherwise there seems to be no difference between them and the others.

4. *Chargés d'affaires, accredited to the minister of foreign affairs.*—*Chargés d'affaires* are accredited from foreign minister to foreign minister, differing in this respect from the other classes of public ministers. Consequently, they enjoy fewer honors than the others, though they are entitled to the same rights and privileges.

A distinction should be made between a *chargé d'affaires*, who is the head of the legation and a *chargé d'affaires ad interim*. The *chargé d'affaires ad interim* takes the place of the head of the legation during the latter's leave of absence. Such a *chargé d'affaires ad interim*, being a mere delegate of the absent head of the legation, ranks below the ordinary *chargé d'affaires*.

"Every public minister, in some measure, represents the State or sovereign by whom he is sent, as an agent represents his constituent; but an ambassador is considered as peculiarly representing the honor and dignity of his principal, and, if the representative of a monarchical government, he has been regarded as entitled to the dignity and exact ceremonial of one representing the person of his sovereign. The terms *ordinary* and *extraordinary* are applied to designate the time of their intended residence and employment, whether for an indeterminate period, or only for a particular or extraordinary occasion. In Europe, the right of sending ambassadors is considered as exclusively confined to crowned heads, to the great Republics, and to other states entitled to royal honors. Papal legates, or nuncios and internuncios, at courts, are usually ranked as ambassadors or ministers.

"Envoys and other public ministers not invested with the peculiar character which is supposed to be derived from representing generally the dignity of the state or the person of the sovereign, come next in rank to ambassadors. They represent their principal only in respect to the particular business committed to their charge at the court to which they are accredited. They are variously named, as envoys, envoys extraordinary, and minister plenipotentiary. Since the loss of the Papal States the Pope is no longer a sovereign, but his nuncios, as above stated, when sent to and received by foreign states, are treated by the latter as diplomatic ministers and are accorded like privileges; and states who receive them grant the Pope the privileges of a sovereign. But nuncios or internuncios are not diplomatic ministers, nor can the Pope enter into International treaties or claim admission to a Conference of States. His concordats are entered into between him, in his spiritual capacity only, and sovereign states. Martens says: 'A distinction is made between the envoy and the envoy extraordinary, and between the envoy ex-

traordinary and the plenipotentiary. But these distinctions have no influence with regard to precedence.'

"In the third class are included ministers, ministers resident, residents, and special ministers charged with a particular business, and accredited to sovereigns. Vattel thus distinguishes between a minister resident, and one called simply minister, and gives us the origin of the name: 'The word *resident* formerly only related to the continuance of the minister's stay, and it is frequent in history for ambassadors in ordinary to be styled only residents. But since the establishment of different orders of ministers, the name of resident has been limited to ministers of a third order, to the character of which general practice has annexed a lesser degree of regard. The resident does not represent the prince's person in his dignity, but only his affairs.'"

Halleck, (Baker's 4th ed.), vol. 1, pp. 351-352.

III. COMMISSIONERS, COUNSELLORS, ATTACHÉS, AND SECRETARIES OF LEGATION.

"The rank of 'commissaire' (commissioner) is not mentioned in the Rules of Vienna and Aix-la-Chapelle. In the practice of this government commissioners have often, from the foundation of the government, borne commissions signed by the head of the government, and have been accredited and received as full envoys. Other commissioners, however, have been at times appointed on the certification of the Secretary of State and without diplomatic capacity. The title is vague, and only the language and purport of the incumbent's commission and creditial letters can determine whether it possesses a diplomatic character; and the government to which he is accredited usually assigns his rank by the formality of acceptance."

Mr. Foster, Sec. of State, to Mr. Heard, No. 151, Dip. Series, Oct. 31, 1892, MS. Inst. Corea, 1. 414. Cited from Moore, *International Law Digest*, vol. IV, p. 440.

"Commissioners for special objects are not considered so to represent their government, or to be employed in such functions, as to acquire diplomatic immunities. They are however held to have a right to special protection, and courtesy may sometimes demand something more. It would probably not be incorrect to say that no very distinct practice has been formed as to their treatment, contentious cases not having sufficiently arisen."

Hall, *International Law* (7th ed.), p. 325.

"Commissaries are agents sent with a letter of recommendation or commission by one state to another for negotiations, not of a political but of a technical or administrative character only. Such commissaries are, for instance, sent and received for the purpose of

arrangements between the two states as regards railways, post, telegraphs, navigation, delineation of boundary lines, and so on. A distinct practice of guaranteeing certain privileges to such commissaries has not grown up, but inviolability of their persons and official papers ought to be granted to them, as they are officially sent and received for official purposes. Thus Germany, in 1887, in the case of the French officer of police Schnaebélé, who was invited by local German functionaries to cross the German frontier for official purposes and then arrested, recognized the rule that a safe-conduct is tacitly granted to foreign officials when they enter officially the territory of a state with the consent of the local authorities, although Schnaebélé was not a commissary sent by his Government to the German Government."

Oppenheim, *op. cit.*, vol. 1, p. 511.

Attached to the embassy or legation there are, besides the public ministers, the various secretaries of embassy or legation (for example, first secretary, second secretary, third secretary, or secretary interpreter, as the case may be); and counselor of legation; military and naval attachés; commercial attachés; technical and scientific attachés; student attachés, etc.

"*The Conseiller of Embassy or of Legation* is an agent whom governments attach some time to diplomatic missions in order to assist with his advice the public minister in affairs of certain importance, or which demand special knowledge which the minister is not deemed to possess.

"No diplomatic usage has fixed the attributes of the conseiller of legation. They are ordinarily determined by his government, and are merged into those of secretary of legation. It is the rule to-day, in the absence of formal instructions to the contrary, for the conseiller to supply the place of the chief of the mission, disabled or absent; and it is only in succession to the former, or in his absence, that this task is devolved upon the first secretary. The conseiller shares the privileges and immunities recognized in secretaries. Like the latter, he is named and appointed by the government itself, which gives notice of his nomination to the minister of foreign affairs of the country where he is to reside. He is presented to the sovereign of this country by the chief of the post to which he is attached. He is clothed with a certain representative character; enjoys immunities of his own, independently of the ambassador, or of the chief of legation, but has no right to any ceremonial. In Germany the title of conseiller of legation is conferred upon the conseiller of the department of foreign affairs."

Calvo, *Dictionnaire de Droit International*, vol. 1, pp. 178-179.

"In recent years the United States has adopted a custom, established by the military powers of Europe, of sending abroad officers

of the army and navy to study and report to their respective departments the progress made in military and naval matters, to attend the maneuvers, and witness the movements of armies and squadrons in time of war. Officers, when designated by the respective departments, are commissioned by the secretary of state, assigned to reside at the leading capitals where missions are established, and notice of their designation is given the resident government by the ambassador or minister. Though they are attached to the mission, they are not under the direction of its chief, and report directly to the heads of their own departments. In ceremonial representations, the naval and military attachés form a part of the official staff of a mission, and take precedence according to their rank, those above a captain in the navy, or colonel in the army having place above the secretaries, and those of lower rank next below the first secretary."

Foster. *The Practice of Diplomacy*, p. 210.

Military attachés are "special agents who, according to recent usage, are added to diplomatic legations. They are more particularly charged with observing in the country to which they are sent everything relating to military affairs, with assisting at revues and maneuvers to which they are ordinarily invited, and concerning which they render accounts to their Governments. These attachés are generally army officers of a more or less superior rank.

"These agents form part of the legation. If they do not represent their Governments directly, they are auxiliaries of its representatives in all that concerns the study and solution of military questions. Their function is only a division of the more general functions of the head of the nation.

"As they are commissioned and accredited by the Government itself, clothed with a public and official character, there are the same reasons as in the case of diplomatic agents, properly so called, for not being disturbed in their functions by judicial process or acts of execution. They possess then, because of their title and by reason of their position of dependence upon a diplomatic legation, the right to participate in the privileges of extraterritoriality and the prerogatives which flow from these."

Calvo, *op. cit.*, vol. 1, p. 66.

Naval attachés perform similar functions in respect to naval matters. Both military and naval attachés, particularly those connected with the German and Russian Embassies, have attained a malodorous reputation in consequence of the abuse of their functions. In fact, they have come to be regarded as spies in the employ of their Governments.

Secretaries of embassy and legation.—"The functions of secretaries vary according to the domestic regulations of each country. Most generally they consist in seconding the minister in everything

according to orders, in editing and sending notes and official dispatches, in executing verbal missions intended for the public administration of the country where they reside or for other foreign representatives; in classifying and supervising the archives of the mission; in coding and decoding dispatches; in listing notes or letters which the minister may have to write upon claims or particular matter; finally, in the absence of the regularly organized chancellery, to frame protocols and procès-verbaux, to receive and legalize civil acts, birth certificates, and other documents of interest to their nationals, to deliver and visé passports, etc.

“Unless there are formal orders to the contrary, it is the rule that the chancellor of the embassy or legation or, in their absence, the first secretary, take the place of the head of the mission, prevented or absent, and that they should be presented to the minister of foreign affairs of the country as *chargé d'affaires ad interim* of the embassy or of the legation.

“These secretaries of embassy or of legation have the right to certain privileges and immunities:

“The private secretary is attached only to the person of the ambassador or minister and only serves the one who employs him. It is not the same with the secretaries of embassies or of the legations who are named by the Government itself and whose nomination is notified to the minister of foreign affairs of the country where they are to reside. They are ordinarily presented to the sovereign of this country by the head of the mission to which they are attached; they belong at once to the mission and the diplomatic career, and by reason of this fact are clothed with a certain representative character. They also enjoy proper immunities independently of those of the embassy or head of the legation to whose orders they are only subject to the degree laid down in the instructions of the Government which has named them. The secretaries of embassy or legation enjoy especially, as official persons, the privilege of diplomatic agents in everything that touches the exemption from all local jurisdiction, but they have no ceremonial rights.

“One should distinguish the secretary of embassy or of legation from the private secretary of the minister. As a rule, they are only employed in relation to the minister's private affairs and personal correspondence, in the details which interest him merely as an individual.

“At the same time, one must admit that, making a part of the household of the minister, without having any right to diplomatic immunities, the private secretaries, as a reflex of the independence with which the minister is clothed, like him are exempt from civil jurisdiction, although they have no public character.”

IV. CREDENTIALS OF PUBLIC MINISTERS.

Before entering upon his mission, a public minister should in general be furnished by his home Government with the following documents:

1. *A letter of credence*, stating the name, rank, etc., the object of his mission, and bespeaking for him full faith and credit in conducting the business with which he is charged. This letter of credence is usually addressed by his sovereign to the sovereign or chief of the State to whom he is accredited.

Permanent ambassadors or public ministers receive a sealed letter of credence as well as an open copy. When the envoy arrives at his destination, he should send a copy to the foreign office in order that his arrival may be officially notified. The sealed original should be delivered personally to the head of the State to whom he is accredited. A permanent envoy needs no other empowering document, unless he is intrusted with duties beyond the limits of the ordinary business of the legation.

In case he is intrusted with any special duty as, for example, the negotiations of a special treaty, he should have a special empowering document, called "full powers."

2. *Full powers or authority to negotiate*.—These powers may be contained in the letter of credence or be conferred by letters patent and signed by the head of the State. Their purpose is to define the limits within which the agent may negotiate and the extent to which his acts may be deemed binding on his Government. Full powers may be limited or unlimited, and they are no longer understood as legally binding upon the sovereign, the right of ratification being in all cases either expressly or tacitly reserved.

Diplomatic envoys who are sent on extraordinary missions, such as representatives at a congress or to negotiate a special treaty, receive full powers only and no letter of credence.

3. *Instructions*.—Instructions are directions furnished to the agent by his home Government, either at the beginning or in the course of his mission to serve as a guide in his dealings with the Government to which he is accredited or in conducting negotiations. They usually state the object of the mission, lay down rules for the transaction of his business, and inform him as to the extent of his powers or the real intentions of his Government.

The instructions may be general or special, oral or written, secret or public. They are generally written and secret or confidential and should not be communicated without the direction or consent of the home Government. It has happened that negotiators have been furnished with a double set of instructions—one secret and the other open. Rivier justly observes on this point: "The respect and loyalty

which states owe one another requires that these instructions be not contradictory.”

Rivier, *Principes du Droit des Gens*, vol. 1, p. 464.

4. *Passports and safe conduct*.—Every permanent diplomatic envoy should be provided with special passports for himself and his suite, and in some cases a safe conduct. The latter contains a description of the agent's person and grants special authorization to travel to the State or the Government to which he is sent. (On safe conducts from belligerent powers, see “Recall of Captains Boy-Ed and Von Papen.”

5. *The cipher or secret key for communication with the home Government*.—“The ancient method of secret cipher for concealing correspondence is still followed in the Department of State as well as in all other civilized Governments. This cipher is furnished to the embassies and legations, and is in frequent use between them and the home Government. It is scarcely possible to construct a cipher which can not be translated, and Governments understand this fact. Its use is resorted to mainly for the purpose of concealing official messages from the telegraphic operators who handle them and from the general public. In time of war they are fair game for the enemy, and in critical periods they are a great temptation to a not over-scrupulous Government.”

Foster, *op. cit.*, p. 215.

“7. In most cases, a mission of the United States will be found already established at the seat of government and still in charge of the outgoing representative or of a chargé d'affaires *ad interim*. In either case, the newly arrived representative should seek, through the actual incumbent of the mission, an informal conference with the minister for foreign affairs, or such other officer of the government to which he is accredited as may be found authorized to act in the premises, and arrange with him for his official reception. He should at the same time, in his own name, address a formal note to the minister for foreign affairs, communicating the fact of his appointment and his rank and requesting the designation of a time and place for presenting his letter of credence.

“8. Should the representative be of the grade of ambassador extraordinary and plenipotentiary, envoy extraordinary and minister plenipotentiary, or minister resident—in any of which cases he will bear a letter of credence signed by the President and addressed to the chief of the government—he should, on asking audience for the purpose of presenting the original in person, communicate to the minister for foreign affairs the open office copy which accompanies his original instructions. He will also, for the completion of the archives of his mission, prepare and retain on file a copy of his letter of credence.

"9. If the diplomatic representatives be of the rank of chargé d'affaires, bearing a letter of credence addressed to the minister for foreign affairs, he should, on addressing to the minister the formal note prescribed in Paragraph 7, communicate to him the office copy of his letter of credence and await the minister's pleasure as to receiving the original in a personal interview.

"10. On the occasion of presenting ceremonial letters of credence or of recall to the head of the government, it is usual at most capitals for the retiring or incoming diplomatic representative to make a brief address pertinent to the occasion. This address should be written and spoken in English by the representative of the United States. Before the day fixed for his audience of reception or of leave-taking, the diplomatic representative should furnish to the minister for foreign affairs a copy of his proposed remarks in order that a suitable reply thereto may be prepared. A copy of the address and of the reply must be sent to the Department of State."

Instructions to Diplomatic Officers of the United States (1897) secs. 7-10. Moore, *op. cit.*, vol. IV, p. 461.

"The date of reception of credentials regulates the order of standing or precedence of envoys of the same rank at the capital where they are stationed, the one newly received going to the foot of the list. After the passage of the statute of 1893, authorizing ambassadors in the United States diplomatic service, it was determined by the leading powers of Europe to raise their ministers in Washington to the rank of ambassadors, and there occurred a quiet struggle for the first presentation of such credentials, as that act would make the deliverer of them the head or dean of the local diplomatic corps. The French Government first nominated its minister an ambassador, and was soon followed by the British Government."

Foster, *op. cit.*, p. 70.

V. THE APPOINTMENT AND RECEPTION OF DIPLOMATIC AGENTS.

Every sovereign State enjoys what are known as the active and passive rights of legation—that is, the rights of sending and of receiving diplomatic agents. But there is no corresponding obligation to send and receive foreign ministers, though a State which refuses all diplomatic intercourse would practically lose its membership in the international community.

"Each State is free in the choice of its agents, though the government to which they are accredited is not, strictly speaking, bound to receive them. It may refuse to enter into or to continue diplomatic relations with a particular State, but under certain circumstances such refusal might be construed as unfriendly, or even hostile. It

may, of course, refuse to enter into negotiations which have a particular purpose. A State may decline to receive a particular agent who is *persona non grata*, one of its own citizens or subjects, or one whose duties or powers are deemed incompatible with the institutions of the receiving State.

"But the grounds for rejection should not be frivolous and should be clearly stated, if possible. In order to avoid unpleasant incidents of this nature it is customary (though not obligatory) to make confidential inquiries beforehand as to whether the appointment of a certain person would be agreeable to the government of the country to which he is to be accredited. This custom is usually referred to as *l'agregation* (agreement)."

Hershey, *op. cit.*, pp. 174. 276-277.

"*Agregation*.—To avoid unpleasantness arising from a refusal, it is the usual practice to submit the name of the person whom it is desired to appoint, beforehand, to the Head of the State to whom he is to be accredited. This is done confidentially and by word of mouth, though from the fact that forms of acceptance are to be found in books, it might be inferred that the matter is sometimes arranged by an interchange of letters. The channel generally employed is the retiring diplomatic agent of the Court which appoints, or more often the *Chargé d'Affaires ad interim*. Sometimes it is done by the minister for Foreign Affairs addressing himself to the diplomatic representatives of the Power to which the diplomatist is to be accredited. When the Pope is about to appoint a *nuncio* or legate to the Court of Austria-Hungary, or Spain (formerly also to France and Portugal) he submits a list of three names, called a *terna*, to the Sovereign, who then is at liberty to make his choice. If there exist no special reasons for exercising the power of choosing, it is usual to take the name that stands first.

"It is a matter of dispute whether a refusal must be accompanied by a statement of the grounds on which it is made, but it can safely be asserted that if in such a case the reasons are asked for, and they are not given, or if it appear to the Government whose candidate has been refused that the grounds alleged are inadequate, that Power may refuse to make an appointment, and prefer to leave its diplomatic representation in the hands of a *Chargé d'Affaires*."

Satow, *op. cit.*, vol. 1, pp. 188-189.

"The United States has observed the practice of inquiring in advance as to the acceptability of persons whom it has desired to nominate as *ambassadors* since the Government began to appoint diplomatic agents of that grade, but it adheres to its ancient rule with respect to its envoys and diplomatic representatives of a lower grade."

Satow, *op. cit.*, vol. 1, p. 196.

“When the diplomatic minister reaches the capital of the country to which he is accredited, he notifies his arrival to the Minister for Foreign Affairs, and demands an audience of the Sovereign for the purpose of delivering his Letters of Credence. Ambassadors are entitled to public audience, where as ministers of the second and third classes have only the right to a private audience, and the Chargé d’Affaires are obliged to be content with an audience of the Foreign Minister.”

Lawrence, *Principles of International Law* (4th ed.), p. 308.

“As a matter of strict law, it is only after this public reception and a public minister enters upon the actual exercises of his functions that he is fully entitled to diplomatic privileges and immunities; but it is customary international practice to accord him these rights and privileges as soon as he reaches the frontier of the country to which he is accredited, and even during his voyage to such country.”

Hershey, *op. cit.*, pp. 279-280.

“The public character of a diplomatic agent sent to a foreign court, says Heffter, is not developed in all its extent and only assures him the enjoyment of all his rights after the government to which he is accredited has been informed of his mission in an official manner. At the same time, it is not necessary that he be received in a more or less solemn manner. ‘Theoretically,’ writes Francois Pietri, ‘the immunity should only begin from the moment when the public minister has been officially recognized, that is to say, after he has presented in solemn audience to the head of the state his Letters of Credence. But in practice it is admitted that the minister has the right to immunity from the time he has entered the territory and has made himself known. * * * At the same time, if, since his nomination, the public minister has already resided in the country where he is accredited, it is very evident that his immunity should only date from the presentation of his Letters of Credence.’ Moreover, even when the mission has terminated, the minister preserves his public character until he has left the territory; in case of misunderstanding and rupture, a delay sufficient to enable him to return to his own country should be granted to him.”

Nys, *Le Droit International*, vol. II, p. 404.

“Every member of the Family of Nations that possesses the passive right of legation is under ordinary circumstances bound to receive diplomatic envoys accredited to itself from other states for the purpose of negotiation. But the duty extends neither to the reception of permanent envoys nor to the reception of temporary envoys under all circumstances.

“As regards permanent envoys, it is a generally recognized fact that a state is as little bound to receive them as it is to send them,

Practically, however, every full-Sovereign State which desires its voice to be heard among the states receives and sends permanent envoys, as without such it would, under present circumstances, be impossible for a state to have any influence whatever in international affairs. It is for this reason that Switzerland, which in former times abstained entirely from sending permanent envoys, has abandoned her former practice and nowadays sends and receives several. The insignificant Principality of Lichtenstein is, as far as I know, the only full-Sovereign State which neither sends nor receives one single permanent legation.

"But a state may receive a permanent legation from one state and refuse to do so from another. Thus, the Protestant States never *received* a permanent legation from the Popes, even when the latter were heads of a state, and they still observe this rule, although one or another of them, such as Prussia for example, keeps a permanent legation at the Vatican.

"As regards temporary envoys, it is likewise a generally recognized fact among those writers who assert the duty of a state to receive under ordinary circumstances temporary envoys that there are exceptions to that rule. Thus, for example, a state which knows beforehand the objects of a mission and does not wish to negotiate thereon can refuse to receive the mission. Thus, further, a belligerent can refuse to receive a legation from the other belligerent, as war involves the rupture of all peaceable relations.

"But the refusal to receive an envoy must not be confounded with the refusal to receive a certain individual as envoy. A state may be ready to receive a permanent or temporary envoy, but may object to the individual selected for that purpose. International Law gives no right to a state to insist upon the reception of an individual appointed by it as diplomatic envoy. Every state can refuse to receive as envoy a person objectionable to itself. And a state refusing an individual envoy is neither compelled to specify what kind of objection it has, nor to justify its objection. Thus, for example, most states refuse to receive one of their own subjects as an envoy from a foreign state. Thus, again, the King of Hanover refused in 1847 to receive a minister appointed by Prussia because the individual was of the Roman Catholic faith. Italy refused in 1885 to receive Mr. *Keiley* as ambassador of the United States of America because he had in 1871 protested against the annexation of the Papal States. And when the United States sent the same gentleman as ambassador to Austria the latter refused him reception on the ground that his wife was said to be a Jewess. Although, as is apparent from these examples, no state has a right to insist upon the reception of a certain individual as envoy, in practice states are often offended when reception is refused. Thus, in 1832 England

did not cancel for three years the appointment of Sir Stratford Canning as ambassador to Russia, although the latter refused reception, and the post was practically vacant. In 1885, when, as above mentioned, Austria refused reception to Mr. Keiley as ambassador of the United States the latter did not appoint another, although Mr. Keiley resigned, and the legation was for several years left to the care of a *Chargé d'Affaires*. To avoid such conflicts it is a good practice of many states never to appoint an individual as envoy without having ascertained beforehand whether the individual would be *persona grata*. And it is a customary rule of International Law that a state which does not object to the appointment of a certain individual, when its opinion has been asked beforehand, is bound to receive such individual.

"In case a state does not object to the reception of a person as diplomatic envoy accredited to itself, his actual reception takes place as soon as he has arrived at the place of his designation. But the mode of reception differs according to the class to which the envoy belongs. If he be one of the first, second, or third class, it is the duty of the head of the state to receive him solemnly in a so-called public audience with all the usual ceremonies. For that purpose the envoy sends a copy of his credentials to the Foreign Office, which arranges a special audience with the head of the state for the envoy, when he delivers in person his sealed credentials. If the envoy be a *Chargé d'Affaires* only, he is received in audience by the Secretary of Foreign Affairs, to whom he hands his credentials. Through the formal reception the envoy becomes officially recognized and can officially commence to exercise his functions. But such of his privileges as extritoriality and the like, which concern the safety and inviolability of his person, must be granted even before his official reception, as his character as diplomatic envoy is considered to date, not from the time of his official reception, but from the time when his credentials were handed to him on leaving his home state, his passports furnishing sufficient proof of his diplomatic character.

"It must be specially observed that all these details regarding the reception of diplomatic envoys accredited to a state do not apply to the reception of envoys sent to represent the several states at a Congress or Conference. As such envoys are not accredited to the state on whose territory the Congress or Conference takes place, such state has no competence to refuse the reception of the appointed envoys, and no formal and official reception of the latter by the head of the state need take place. The appointing states merely notify the appointment of their envoys to the Foreign Office of the state on whose territory the transactions take place, the envoys call upon the Foreign Secretary after their arrival to introduce themselves, and they are courteously received by him. They do not, however,

hand in to him their Full Powers, but reserve them for the first meeting of the Congress or Conference, where they produce them in exchange with one another."

Oppenheim, vol. 1, pp. 449-452.

On the famous *Keiley* case referred to, see especially Moore, *Digest*, vol. IV, pp. 480-483; Hall (7th ed.), pp. 309-310; Foster, pp. 40-43; and Satow, 1, pp. 192-193.

The case of *Blair* is also an interesting one; see Foster, *op. cit.*, pp. 44-45; and Satow, 1, pp. 194-196.

VI. THE RIGHT OF TRANSIT OR INNOCENT PASSAGE OF PUBLIC MINISTERS THROUGH THIRD STATES OR ON THE HIGH SEAS.

"Although, when an individual is accredited as diplomatic envoy by one State to another, these two States only are directly concerned in his appointment, the question must be discussed, what position such envoy has as regards third States in those cases in which he comes in contact with them. Several such cases are possible. An envoy may, first, travel through the territory of a third State to reach the territory of the receiving State. Or, an envoy may be found there by the other belligerent, who militarily occupies such territory. And, lastly, an envoy accredited to a certain State might interfere with the affairs of a third State.

"If an envoy travels through the territory of a third State incognito or for his pleasure only, there is no doubt that he can not claim any special privileges whatever. He is in exactly the same position as any other foreign individual traveling on this territory, although by courtesy he might be treated with particular attention. But matters are different when an envoy on his way from his own State to the State of his destination travels through the territory of a third State. If the sending and the receiving States are not neighbors, the envoy probably has to travel through the territory of a third State. Now, as the institution of legation is a necessary one for the intercourse of States and is firmly established by international law, there ought to be no doubt whatever that such a third State must grant the right of innocent passage (*jus transitus innoxii*) to the envoy, provided that it is not at war with the sending or the receiving State. But no other privileges, especially those of inviolability and extraterritoriality need be granted to the envoy. And the right of innocent passage does not include the right to stop on the territory longer than is necessary for the passage.

"It must be specially remarked that no right of passage need be granted if the third State is at war with the sending or receiving State. The envoy of a belligerent, who travels through the territory of the other belligerent to reach the place of his destination may

be seized and treated as a prisoner of war. Thus, in 1744, when the French Ambassador, Marechal de Belle-Isle, on his way to Berlin, passed through the territory of Hanover, which country was then, together with England, at war with France, he was made a prisoner of war and sent to England."

Oppenheim, *op. cit.*, vol. 1, pp. 469-471.

"In passing through the territory of a friendly state, other than that of the government to which he is accredited, a public minister, or other diplomatic agent, is entitled to the respect and protection due to his official character, though not invested with all the privileges and immunities which he enjoys in the country to whose government he is sent. He has a right of innocent passage through the dominions of all states friendly to his own country, and to the honours and protection which nations reciprocally owe to each other's diplomatic agents, according to the dignity of their rank and official character. If the state through which he purposes to pass has just reason to suspect his object to be unfriendly, or to apprehend that he will abuse this right by inciting its people to insurrection, furnishing intelligence to its enemies, or plotting against the safety of the government, it may very properly, and without just offense, refuse such innocent passage. But if an innocent passage is granted (and it is always presumed to be by a friendly power, unless specially denied), he is entitled to respect and protection, and any insult or injury to him is regarded as an insult or injury both to the state which sends him and that to which he is sent."

Halleck, *op. cit.*, vol. 1, p. 389.

"A diplomatic agent passing through a third state is certainly more than a mere distinguished traveler. In passing through the territory of another state under the circumstances indicated, he represents his own state in a diplomatic capacity, and enjoys the rights of legation. By hindering or molesting him you interfere with the rights of both states. Consequently, as soon as his character is revealed the agent becomes entitled to claim for himself and his suite, in all matters involving the rights of those two states, respect and complete security, i. e., inviolability. There is, however, no need to regard him as entitled to extraterritoriality. If he stays in a third state, certain favours, such as the exemption from the payment of import duties and other taxes, may be accorded to him as an act of courtesy, without his having any right to demand it. The passage or stay of the agent will be allowed only if it is harmless, or which the state in whose territory he is can alone be the judge. That state will adopt such precautions as it may deem suitable. If passage is accorded, the state can impose a limit on its duration, fix the route to be taken, and prohibit the agent from stopping *en route*. But if the two

states are at war, the agent may, in default of a safe conduct, be made prisoner. It is assumed that the agent is traveling or sojourning in the character of a public personage. If he is there solely for his own pleasure, or in pursuit of some merely private object, he is merely a distinguished personage, neither more nor less."

Rivier, *Principes*, vol. 1, p. 509.

"The case of *Soulé* is an interesting one in this connection. In 1854 Mr. Soulé, United States Minister at Madrid, was provisionally stopped at Calais, France, under an order of the French Minister of the Interior that he should be not allowed to 'penetrate into France' without the knowledge of the French Government. Upon the protest of the United States Minister at Paris, the French Minister of Foreign Affairs replied that the Government of the Emperor had 'not wished' * * * to prevent an envoy of the United States crossing French territory to go to his post in order to acquit himself of the commission with which he was charged by his Government'; that 'if Mr. Soulé was going immediately and directly to Madrid, the route of France was open to him'; that if, on the contrary, he 'intended to go to Paris with a view of tarrying there, that privilege was not accorded to him.' It was explained that he had been stopped with a view of consulting him as to his intentions.

"It should be explained that Mr. Soulé was a native of France and a naturalized American citizen. He had fought a duel with the French ambassador at Madrid and was reported to have criticised the Government of Louis Napoleon."

Moore, *op. cit.*, vol. IV, pp. 557-58.

"It has been deemed right to mention these instances of the practice of nations, but the sound rules which ought to govern this question appear to be:

"1. That, in time of peace, the ambassador is of right *inviolable* in his transit through a third country, but can not claim the privileges of *extraterritoriality* as a matter of tacit compact, though they would probably be accorded to him by the courts of all nations—and to ambassadors to a Congress they are accorded. The diplomatic agents of foreign Powers at Frankfort on the Main were allowed the same privileges, on their transit, as the members of the German Confederation.

"2. That, in time of war, he can not be secure from imprisonment without a previously obtained permission to pass through the territory; but that his life can in no case be taken, unless, indeed, he actually exercises hostilities in the country through which he passes. * * *

"The true International rule would be, that the ambassador should be allowed in all cases the *jus transitus innoxii*. This, though Bynker-

shoek endeavours to misunderstand it, was clearly the law of Holland at the beginning of the eighteenth century. The Mexicans are said to have adopted a similar principle of law: their practice was to mark out a certain route out of which it was not lawful for the hostile ambassador to deviate.

“It is well remarked by Zouch, that both the State which sends the ambassador, and that to which he is sent, are injured by harm or insult inflicted upon him by a third country.”

Phillimore, *Commentaries upon International Law*, pp. 217–218.

The right of innocent passage for public ministers through third States and immunities from civil suit has judicial sanction, at least in the United States.

See *Wilson v. Blanco* (1889), 65 New York Superior Court, 582; and see also Scott, *Cases*, 206.

In the case of the *New Chile Gold Mining Co. v. Blanco and Another*, 1888, 4 *Times Law*, 346, the court took time to consider their judgment and delivered it in “favor of the defendants on the ground that in the exercise of their judicial discretion they did not consider it right to allow a foreign minister (Blanco), residing at a foreign court (France), to be used in the courts of this country, at all events on a cause of action not arising in this country.”

Scott, *Cases*, Note on pp. 207–208.

It is clear, at least since the discussions growing out of the *Trent Affair*, that the diplomatic agents of an enemy State can not be taken from a neutral vessel or on neutral territory. Neutral States have a right to the use of the high seas for diplomatic communication with either belligerent as well as with one another.

On the Right of Transit or Innocent Passage of Public Ministers, see especially Hall, pp. 318–19; Oppenheim, 1, pp. 469–71; Moore, *Digest*, IV, pp. 556–62; and Satow, 1, ch. 15.

Traverse Twiss (*Law of Nations in Time of Peace*, pp. 373–76) gives a lengthy review of the authorities.

VII. THE EFFECT OF BELLIGERENT OCCUPATION ON DIPLOMATIC PRIVILEGES. (See also MILITARY OCCUPATION.)

“When in time of war a belligerent occupies the capital of an enemy State and finds there envoys of other States, these envoys do not lose their diplomatic privileges as long as the State to which they are accredited is in existence. As military occupation does not extinguish a State subjected thereto, such envoys do not cease to be envoys. On the other hand, they are not accredited to the belligerent who has taken possession of the territory by military force, and the question is not yet settled by international law how far the occupy-

ing belligerent has to respect the inviolability and extritoriality granted to such envoys by the law of the land in compliance with a demand of international law. It may safely be maintained that he must grant them the right to leave the occupied territory. But must he likewise grant them the right to stay? Has he to respect their immunity of domicile and their other privileges in reference to their extritoriality? Neither customary rules nor international conventions exist as regards these questions, which must, therefore, be treated as open. The only case which occurred concerning this problem is that of Mr. Washburne, ambassador of the United States in Paris during the siege of that town in 1870 by the Germans. This ambassador claimed the right of sending a messenger with dispatches to London in a sealed bag through the German lines. But the Germans refused to grant that right, and did not alter their decision although the Government of the United States protested."

Oppenheim, *op. cit.*, vol. 1, pp. 471-72.

"During the siege of Paris in 1870 the diplomatic corps protested against the refusal of Count Bismarck to permit them to correspond with their governments, except by means of 'open letters.' The United States especially remonstrated against this refusal as an 'uncourteous proceeding,' and maintained that under the circumstances the rights of legation 'must be regarded as paramount to any belligerent right.'"

Moore, *op. cit.*, vol. IV, pp. 696-701; see also Calvo, *Le Droit Int.*, III, pp. 329-31; Hall (7th ed.); and Odier, *Des Privilèges des agents diplomatiques*, pp. 84-89.

"On the other hand, if a diplomatic agent accredited to a country which is at war with another is found by the forces of the latter upon the territory of its enemy, he is conceded all the rights of inviolability which can come into existence as against a state having only military jurisdiction. Whether his privileges extend further, and if so how much further, must probably be regarded as unsettled. The point has not been considered by jurists, and until lately, whether by accident or through the courtesy of belligerents, it has not presented itself in the form of a practical question. During the siege of Paris however it was partially raised by the conduct of the German authorities with reference to the correspondence of diplomatic representatives shut up in the besieged city. On the minister of the United States being refused leave to send a messenger with a bag of despatches to London, except upon condition that the contents of the bag should be unsealed, Mr. Fish directed the American minister at Berlin to protest against the act of the German commanders, and argued in a note, in which the subject was examined, that the right of legation, that is to say the right of a state to send diplo-

matic agents to any country with which it wishes to keep up amicable relations, is amply recognized by international law, that a right of correspondence between the government and its agent is necessarily attendant upon the right of legation, that such correspondence is necessarily confidential in its nature, that the right of maintaining it would be nullified by a right of inspection on the part of a third power, and finally that there is no trace of any special usage authorizing a belligerent to place diplomatic agents in a besieged town on the same footing as ordinary residents by severing their communication with their own governments.

“Looking at the question from the point of view of strict legal right, it is not altogether clear that any good reason can be assigned for giving the interests of a state accrediting an agent priority over those of a belligerent. It is no doubt true that the right of legation is fully established. But the right of legation, primarily at least, is only a right as between the states sending and receiving envoys; in other words, it only secures to each of two states having relations with each other the opportunity of diplomatic intercourse with the other. Is there any sufficient reason for enlarging it to embrace a power of compelling third states to treat countries sending envoys as exercising a right which has priority over their own belligerent rights? Even in time of peace it has been seen that an ambassador can only claim his complete diplomatic immunities in the state to which he is accredited. His privileges in their full extent are dependent on the fact that he has business to transact with the power by whom the privileges are accorded. Wholly apart therefore from any question as to the effect of a conflict between those privileges and urgent interests of a belligerent, there is no presumption in favour of the existence of an obligation on the part of the latter to grant more than personal inviolability. And if the existence of a conflict can be alleged, the case against the priority of ambassadorial rights over those of a belligerent becomes stronger. The rules of war dealing with matters in which such conflict occurs certainly do not presuppose that the rights of neutrals are to be preferred to those of belligerents; and the government of the United States itself, while in the very act of protesting against the right of communication between a state and its agents being subordinated to belligerent rights, admitted that ‘evident military necessity’ would justify a belligerent in overriding it. On the whole it seems difficult, in the absence of a special custom, to deny to belligerents the bare right of restricting the privileges of a minister, not accredited to them, within such limits as may be convenient to themselves, provided that his inviolability remains intact.

“The question however assumes a different aspect if it is looked at from the point of view of the courtesy which a state may reasonably

be expected to show to a friendly power. Diplomatic relations are a part of ordinary international life; there is no reason for supposing that their maintenance is inconsistent with amity toward the invading government; there is on the other hand every reason to suppose that their interruption may be productive of extreme inconvenience to its friend. To withhold any privileges which facilitate those relations, in the absence of suspicion of bad faith or of grave military reasons, is not merely to be commonly discourteous, it is to be ready to injure or imperil the serious interests of a friend without the existence of reasonable probability that any important interests of the belligerent will be remotely touched."

Hall, *op. cit.*, pp. 321-323.

VIII. THE TERMINATION OF DIPLOMATIC MISSIONS.

Diplomatic missions terminate in the following ways: by the "death or recall of the minister; the expiration of the term fixed for the duration of the mission; the success or failure of the object of the mission if it be of a special nature; the death, abdication, or dethronement of the sovereign or Chief of State to whom or by whom the minister has been accredited; dismissal or withdrawal as a consequence of some serious offence on one side or the other; a change in the rank or class of the agent or embassy; a declaration or outbreak of war; or a radical change in the form of government of either country. In every case the diplomatic agent retains his privileges and immunities until his return to his own country."

Hershey, *op. cit.*, pp. 280-81.

"A diplomatic mission may come to an end from eleven different causes—namely, accomplishment of the object for which the mission was sent; expiration of such Letters of Credence as were given to an envoy for a specific time only; recall of the envoy by the sending state; his promotion to a higher class; the delivery of passports to him by the receiving state; request of the envoy for his passports on account of ill-treatment; war between the sending and the receiving state; revolutionary change of government of the sending or receiving state; constitutional changes in the headship of the sending or receiving state; extinction of the sending or receiving state; and, lastly, death of the envoy. These events must be treated singly on account of their peculiarities. But the termination of diplomatic missions must not be confounded with their suspension. Whereas from the foregoing eleven causes a mission comes actually to an end, and new Letters of Credence are necessary, a suspension does not put an end to the mission, but creates an interval during which the envoy, although he remains in office, can not exercise his office. Suspension may be the result of various causes, as, for instance, a revolution

within the sending or receiving state. Whatever the cause may be, an envoy enjoys all his privileges during the duration of the suspension.

“A mission comes to an end through the fulfilment of its objects in all cases of missions for special purposes. Such cases may be ceremonial functions like representations at weddings, funerals, coronations; or notification of changes in the headship of a state, or representation of a state at Conferences and Congresses; and other cases. Although the mission is terminated through the accomplishment of its object the envoys enjoy all their privileges on their way home.”

Oppenheim, *op. cit.*, vol. 1, pp. 476-77.

“A civil officer has a right to resign his office at pleasure, and, to take effect, it is only necessary that the resignation should be received by the President; but it is customary, in the case of diplomatic officers, to fix a date when the resignation shall be deemed to take effect. Resignation while at one's post is, unless otherwise specified, understood to take effect on the officer's being relieved by his successor; but resignation while on leave in the United States is understood to take effect from the date of its acceptance.

“If the diplomatic agent tenders his resignation while absent from his post on leave, but not in the United States, it is understood, unless otherwise stated, that he will return to his mission on the termination of his allotted leave and await the arrival of his successor; but if his successor reach the seat of his mission before the termination of the agent's leave of absence, his resignation and his leave of absence take effect and determine on the entrance of his successor upon the duties of his office by presentation of his credentials.

“If a diplomatic agent, having received leave of absence (with or without permission to return to the United States), tender his resignation to take effect at the expiration of his leave of absence, it may be so accepted, provided the demands of the public service do not require that the vacancy be sooner filled; and if so filled, the retiring officer's leave shall be held to terminate thereby.

“A recall is usually accomplished at the pleasure of the President, during a session of the Senate, by sending to that body the nomination of the officer's successor. Upon the confirmation and commission of his successor the original incumbent's office ceases. He is, however, expected to remain at his post until duly relieved. If circumstances require otherwise, the case must be governed by the special instructions of the Secretary of State. In any case his official functions do not cease until he has received notification of the appointment of his successor, either by specific instruction of the Department of State or by the exhibition of his successor's commission:

"A diplomatic officer may be recalled while on leave of absence, and his successor appointed, as above. In such case, his office, and with it his leave of absence, ceases on the receipt by him of official notification of the fact."

Instructions to Diplomatic Officers of the United States (1897), secs. 272-280. Cited from Moore, *op. cit.*, vol. 1, pp. 470-471.

"A mission may terminate, further, through the delivery of his passports to an envoy by the receiving state. The reason for such dismissal of an envoy may be either gross misconduct on his part or a quarrel between the sending and the receiving state which leads to a rupture of diplomatic intercourse. Whenever such rupture takes place, diplomatic relations between the two states come to an end and all diplomatic privileges cease with the envoy's departing and crossing the frontier. If the archives of the legation are not removed, they must be put under seal by the departing envoy and confided to the protection of some other foreign legation.

"Without being recalled, an envoy may on his own account, ask for his passports and depart in consequence of ill treatment by the receiving state. This may or may not lead to a rupture of diplomatic intercourse.

"When war breaks out between the sending and the receiving state before their envoys accredited to each other are recalled, their mission nevertheless comes to an end. They receive their passports, but nevertheless they must be granted their privileges on their way home.

"If the head of the sending or receiving state is a Sovereign, his death or abdication terminates the missions sent and received by him; and all envoys remaining at their posts must receive new Letters of Credence. But if they receive new Letters of Credence, no change in seniority is considered to have taken place from the order in force before the change. And during the time between the termination of the missions and the arrival of new Letters of Credence they enjoy nevertheless all the privileges of diplomatic envoys.

"As regards the influence of constitutional changes in the headship of republics on the missions sent or received, no certain rule exists. Everything depends, therefore, upon the merits of the special case.

"A revolutionary movement in the sending or receiving state which creates a new government, changing, for example, a republic into a monarchy or a monarchy into a republic, or deposing a Sovereign and enthroning another, terminates the missions. All envoys remaining at their posts must receive new Letters of Credence, but no change in seniority takes place if they receive them. It happens that in cases of revolutionary changes of government foreign States

for some time neither send new Letters of Credence to their envoys nor recall them, watching the course of events in the meantime and waiting for more proof of a real settlement. In such cases the envoys are, according to an international usage, granted all privileges of diplomatic envoys, although in strict law they have ceased to be such. In cases of recall subsequent to revolutionary changes, the protection of subjects of the recalling states remains in the hands of their consuls, since the consular office does not come to an end through constitutional or revolutionary changes in the headship of a state.

"If the sending or receiving state of a mission is extinguished by voluntary merger into another state or through annexation in consequence of conquest, the mission terminates *ipso facto*. In case of annexation of the receiving state, there can be no doubt, that although the annexing state will not consider the envoys received by the annexed state as accredited to itself, it must grant those envoys the right to leave the territory of the annexed state unmolested and to take their archives away with them. In case of annexation of the sending state the question arises, What becomes of the archives and legational property of the missions of the annexed state accredited to foreign states? This question is one of the so-called succession of states. The annexing state acquires, *ipso facto*, by the annexation the property in those archives and other legational goods, such as the hotels, furniture, and the like. But as long as the annexation is not notified and recognised, the receiving states have no duty to interfere.

"A mission ends, lastly, by the death of the envoy. As soon as an envoy is dead, his effects, and especially his papers, must be sealed. This is done by a member of the dead envoy's legation, or if there be no such members, by a member of another legation accredited to the same state. The local government must not interfere, unless at the special request by the home state of the deceased envoy.

"Although the mission, and therefore the privileges of the envoy come to an end by his death, the members of his family who resided under his roof and the members of his suite enjoy their privileges until they leave the country. But a certain time may be fixed for them to depart, and on its expiration they lose their privilege of extritoriality. It must be specially mentioned that the courts of the receiving state have no jurisdiction whatever over the goods and effects of the deceased envoy, and that no death duties can be demanded."

Oppenheim, *op. cit.*, vol. 1, pp. 478-481. On Termination of Missions, see also Foster, ch. 9, pp. 175ff; Bonfils (7th ed.), pp. 490-491; Nys, *Le Droit Int.*, II, ch. 6, pp. 447-449; Rivier, II, pp. 514-518; and Satow, I, ch. 24, pp. 365ff.

IX. RECALL OF PUBLIC MINISTERS.

“The normal and most frequent mode of termination is by *Recall*. Before his departure, a public minister usually has another audience with the sovereign or foreign minister, and presents his Letter of Recall. He receives in return a letter or papers of commendation (*lettres de récréance*), his passport, and, at some courts, presents or decorations.

“Just as a state may, on reasonable grounds, decline to receive any particular person as a public minister, so it may, at any time, demand the recall of a resident minister or other diplomatic agent, for good and sufficient reasons; if, for example, the minister has rendered further intercourse difficult or impossible, or if he has made himself personally obnoxious to the sovereign or foreign minister of the government to which he is accredited. Such a request, if made in good faith and for sufficient reason, should be at once complied with, but there can be no legal obligation in the matter. The government by whom the minister has been accredited has the right to pass upon the facts and decide for itself whether the conduct of its agent has been such or whether its interests in the premises are of such a nature as to make it desirable to comply with the wishes of the government which has requested the recall.”

Hershey, *op. cit.*, pp. 281–82.

“The mission of an envoy, be he permanently or only temporarily appointed, terminates through his recall by the sending state. If this recall is not caused by unfriendly acts of the receiving state but by other circumstances, the envoy receives a Letter of Recall from the head, or, in case he is only a Chargé d’Affaires from the Foreign Secretary of his home state, and he hands this letter over to the head of the receiving state in a solemn audience, or in the case of a Chargé d’Affaires to the Foreign Secretary. In exchange for the Letter of Recall the envoy receives his passports and a so-called *lettre de récréance*, a letter in which the head of the receiving state (or the Foreign Secretary) acknowledges the Letter of Recall. Although therewith his mission ends, he enjoys nevertheless all his privileges on his home journey. A recall may be caused by the resignation of the envoy, by his transference to another post, and the like. It may, secondly, be caused by the outbreak of a conflict between the sending and the receiving state which leads to a rupture of diplomatic intercourse, and under these circumstances the sending state may order its envoy to ask for his passports and depart at once without handing in a Letter of Recall. And, thirdly, a recall may result from a request of the receiving state by reason of real or alleged misconduct of the envoy. Such request of recall may lead to a rupture of diplomatic intercourse, if the receiving state insists upon

the recall, although the sending state does not recognize the act of its envoy as misconduct."

Oppenheim, *op. cit.*, vol. 1, pp. 477-478.

The most celebrated case of a request for the recall of a public minister is perhaps that of *Genet*. But the circumstances which led to the recall of the French minister in 1793 are so well known that it seems unnecessary to recapitulate them. Suffice it to say that his conduct was such that our Government would have been amply justified in sending him out of the country.

See especially Moore, *op. cit.*, vol. II, pp. 485-87; Moore, *Int. Arbitrations*, 4404-4412; and Moore, *American Diplomacy*, pp. 38-48.

The request of the French Government for the recall of *Gouverneur Morris* made at the same time was also fully justified. Morris had been engaged in intrigues in favor of the monarchical or court party.

The United States seems also to have been justified in its request for the recall (in 1871) of the Russian Minister *Catacazy*, who had rendered himself personally obnoxious by conversation and publications abusive of President Grant.

The most recent incident of this sort is that of the Spanish Minister *De Lôme*. On February 8, 1898, the *New York Journal* published a private letter abstracted from the mails at Havana by a Cuban sympathizer, in which the Spanish minister had described President McKinley as "weak and a bidder for the admiration of the crowd, besides being a would-be (or rather second-rate) politician (politico-castro)"; and he intimated that it would be advantageous for Spain to take up, "even if only for effect," the question of commercial relations. The United States promptly asked for his recall; but *De Lôme*, recognizing that his usefulness was at an end, had offered his resignation before the matter could be laid before the Spanish Government. It was promptly accepted.

For these and other cases, see Moore, *op. cit.*, vol. IV, pp. 484-508.

Though it is not strictly obligatory to accede to a request for recall, "the instances must be rare, indeed, in which such a request ought not to be granted."

Mr. Buchanan, Secretary of State, to Mr. Jewett, 1847, Moore, *op. cit.*, vol. 1, p. 494.

Reasons for the request should always be given, if possible. In 1852 Secretary Everett refused to give reasons for a request for the recall of the Minister from Nicaragua, but these reasons were afterwards given.

Moore, *op. cit.*, vol. IV, p. 498.

That a Government must be its own judge as to the validity of alleged reasons for recall is shown by the circumstances which led to

the request for the recall of the United States Minister Wise by the Brazilian Government in 1847. The conduct of Mr. Wise in attempting to secure the release of Lieut. Davis and the American sailors who had been imprisoned by the Brazilian authorities was highly approved by the United States Government, and his subsequent failure to appear at several court fêtes (the acts nominally alleged as reasons for his recall) was due to a sense of "recent insult and indignity." No Government could afford to recall a minister under circumstances which involved an implied censure for acts of which it heartily approved.

Moore, *op. cit.*, pp. 495-497. For these and other examples of recall, see also Satow, 1, ch. 24; and Hershey, note on p. 282.

"The conclusion to be drawn is that any Government has the right of asking for the recall of a foreign diplomatic agent on the ground that his continuance at his post is not desired, and the Government which has appointed him has an equal right of declining to withdraw him. In judging of any controversy that may arise regarding the demand and the refusal to comply, the grounds on which recall was asked for and those on which it was refused must be carefully weighed. If the Government which asked for the recall is dissatisfied with the grounds of refusal, it can send the diplomatic agent his passports. As long as the diplomatic agent of the dismissing Government has not rendered himself *persona ingrata* there is no reason for dismissing him. That would only be done if the dismissal was intended to wear the aspect of a national affront. But if the grounds of dismissal appear insufficient to the Government which accredited the diplomatist, it can indicate its view by entrusting the mission for a while to a *Chargé d'Affaires*. In any case of the kind a Government asked to recall its agent will naturally desire to ascertain whether he has exceeded or acted contrary to his instructions, and thereby rendered himself responsible for the offense he has given. If it finds that he has not, it can not, out of self-respect, consent to the demand, and must leave it to the other Government to dismiss him. It is a tenable opinion that the agent's Government is entitled to satisfaction on this point. It may prove difficult for the historian, who has only official documents before him, to pronounce in each instance what was the determining factor in the decision to ask for a recall. Ostensibly taken on political grounds, it may also have been influenced in some cases by the general conduct of the agent."

Satow, *op. cit.*, vol. 1, pp. 406-407.

X. DISMISSAL OF PUBLIC MINISTERS.

"A minister should only be positively dismissed under the most extreme circumstances, as when hostilities are on the point of breaking out, an impossible ultimatum has been delivered, if his Government has positively refused reparation for a serious wrong, when his personal conduct has been such as to make it practically impossible to continue further relations with him, or in case of interference in internal or domestic affairs."

Hershey, *op. cit.*, p. 283.

Hall, who shows an anti-American bias upon several occasions in his otherwise admirable work, somewhat sneeringly remarks: "The United States has had the misfortune to supply almost all the modern instances in which a Government has felt unable to continue relations with a minister accredited to it."

Hall, *op. cit.*, p. 316.

Upon a superficial view this reproach appears to be deserved, but an impartial examination of the cases themselves will show that, except in one instance, the dismissals were wholly justifiable. Indeed, it must be admitted that in some of these cases our Government showed a forbearance bordering upon pusillanimity.

The first of these unfortunate cases was that of the Spanish Minister *Yrujo* in 1804-1806. After denouncing an act of Congress as "an atrocious libel" *Yrujo* attempted (in 1804) to corrupt the editor of a newspaper by offering a pecuniary consideration for opposing certain measures and views of the Government of the United States and advocating those of Spain. Though the Spanish Government had granted him "permission" to return to Spain in response to a request for his recall, *Yrujo* failed to take his departure, and returned to Washington early in 1806, where he was officially informed that his presence was "dissatisfactory" to the President. Thereupon he notified the United States Government that he intended to remain in Washington as long as it might suit the "interests of the king" and his own "personal convenience," and that he remained in possession of all his rights and privileges. He not only communicated his correspondence with our Government to his colleagues of the diplomatic corps, but he also caused it to be published in the newspapers. His conduct appears, however, to have been approved by the Spanish Government. Though virtually dismissed early in 1806 he remained in the country until late in 1807. Together with Merry, the British Minister, *Yrujo* was also implicated in the Burr conspiracy.

On the *Yrujo Incident*, see especially 2 Adams, *History of the U. S.*, vol. II, pp. 258-268, 362-373; 3 *ibid.*, III, 184-189, 194, 209, 236-264; Foster, *Am. Diplomacy*, 217-220, 225; *Moore, *Digest*, IV, pp. 508-511; Wharton, *Digest*, 1, pp. 605 and 698.

The second case is that of the British Minister Jackson, in 1809-1810, who twice intimated that our Government had been guilty of falsehood and duplicity in its negotiations with the British Government. He was consequently informed that no further communications from him would be received, and Mr. Pinkney, then United States Minister in London, was instructed to ask for his recall (Nov. 23, 1809). Diplomatic relations having been suspended pending his recall, Mr. Jackson was finally (March 14, 1810) directed to return to England, though Lord Wellesley stated that his conduct was not disapproved by the British Government.

In the meantime Mr. Jackson had withdrawn from Washington to New York and Boston, where he gave a toast "so flagitiously insolent to the Government of the United States that Mr. Madison was compelled to direct that his recall should be immediately demanded." Anyone who will read the amusing note published by Mr. Wharton in his *Digest* (1, pp. 107 ff., reprinted in Moore, IV, pp. 515 ff.) can not fail to be convinced that if the administration of Mr. Madison is subject to criticism in this matter, it is that it was insufficiently vigorous.

On *Jackson's Case*, see Adams, *History*, V, 96-132, 154-157, 212-219; Foster, *Am. Diplomacy*, 220-223; *Moore, vol. IV, *op. cit.*, 511-525; *Wharton, 1, pp. 713-723.

In 1849 Secretary Clayton refused to hold any further correspondence with the French Minister *Poussin*, on the ground that he had used language disrespectful to our Government.

Moore, *op. cit.*, pp. 531-533.

In 1856 Secretary Marcy announced to the British Minister, Mr. *Crampton*, the determination of the President to "discontinue further intercourse" with him on the ground that he had continued to violate the neutrality laws of the United States by participation in the recruiting of troops for the Crimean War after he had been admonished not to do so. His recall had been refused by the British Government which placed a different construction upon our neutrality laws than maintained by the United States.

Moore, *op. cit.*, vol. IV, pp. 533-535.

A more recent case is that of Lord *Sackville-West*, a curious "breach of diplomatic privilege and invasion of purely domestic affairs." During the Presidential campaign of 1888, the British Minister was made the victim of a common electioneering trick. He received a letter marked "private," purporting to come from a naturalized Anglo-American residing in California, asking his advice as to the presidential candidate most likely to favor British interests. In his reply to this decoy letter, Lord Sackville intimated that the Democratic Party was secretly, though not openly, friendly

to Great Britain, and he inclosed an extract from a newspaper in which electors were advised to vote for President Cleveland.

The letter was published a few weeks before the election, and used as a campaign document against the candidate whom it was intended to favor. The situation was rendered more difficult by reason of Lord Sackville's unsuccessful attempts to explain matters to American newspaper reporters, in the course of which he accused the administration of acting for political effect. Secretary Bayard promptly cabled Mr. Phelps, the United States Minister in London, to request his lordship's recall as speedily as possible.

Lord Salisbury properly declined to act until he had received Lord Sackville's explanation, but suggested that dismissal was preferable to immediate recall, as dismissal need not end his diplomatic career. Inasmuch as election day was drawing nigh, Lord Sackville promptly received his passports.

The British Minister was undoubtedly guilty of an indiscretion, but it can not be seriously maintained that his offence was of such a character as to justify a dismissal or even a demand for recall. Indeed, the London *Times* (cited by Foster, *Practice of Diplomacy*, p. 189) scarcely put the case too strongly when it said: "A more ridiculous spectacle has rarely been witnessed in any civilized country than the flurried and unmannerly haste with which the government of President Cleveland has endeavored to put a slight on this country, obviously for electioneering purposes, before Her Majesty's ministers could deal, one way or the other, with the alleged indiscretion of the British representative at Washington."

However, the case has its extenuating circumstances. Perhaps the very absurdity or humor of the situation prevented too great resentment on the part of the English. They knew that the Irish vote was not to be trifled with.

On the *Sackville Incident*, see Calvo, VI, c. 258; * Foster, *Practice of Diplomacy*, pp. 187-189; Hall (6th ed.), pp. 300-301 n.; I, Halleck (3d ed.), 1, 367f.; Lawrence (3d ed.), c. 146; * Moore, IV, *Digest*, pp. 536-548; Wheaton (Atlay's ed.), c. 225d.

XI. RESIDENCE AT CAPITAL.

"It is the duty of a foreign minister to reside at the capital of the country to which he is accredited. The secretary of state has in more than one instance had occasion to bring this rule to the attention of foreign diplomats who have been inclined to fix their residence at New York or some other city. The Printed Instructions remind American ministers of this rule, but do not require them to remain continuously at the seat of government, especially when the heads of government absent themselves. During such interval or

vacation, it is sufficient if the minister establishes himself at some convenient place within the country, and the office of the legation is kept open for business. Under such circumstances a minister is understood to be at his post. A century and more ago it was quite the practice in Europe for the diplomatic corps to follow the court when it changed its residence on vacation or otherwise. Mr. Jay, when minister to Madrid, reported to the Continental Congress that his expenses were much increased from his duty of 'following the court.'"

Foster, *op. cit.*, pp. 122-123.

"If the President has, in one or two instances, acquiesced in the residence of foreign ministers in a distant city of the Union, it has been because they have but little business to transact with this government, and because their residence there has given rise to no complaint or breach of privileges on the one hand or of personal injury to American citizens on the other."

Mr. Clay, Sec. of State, to Chev. de Tacon, Dec. 10, 1828, MS. Notes to For. Legs., IV, 98. Cited from Moore, *Digest*, IV, p. 563.

"In July, 1893, the minister of foreign affairs of Nicaragua, in consequence of the bombardment of Managua, the capital of the country, by revolutionists, on the same day wrote to the American minister urging him to take up his temporary residence at Granada, where the legation would be safe from such dangers. The minister replied that his official duty seemed to require his presence during the existing troubles at the seat of the American legation, in the capital of the country, at the same time intimating that the government seemed to be able to protect the city. This reply was commended by the Department of State, which said: 'The first test of an organized government being its ability to maintain public order at the seat of its capital, your intimation that your post of duty is at Managua was timely and proper.'"

Mr. Adee, Acting Sec. of State, to Mr. Baker, Min. at Nicaragua, Sept. 7, 1893, For. Rel., 1893, 213. See Mr. Baker's despatch, *id.*, 205. Cited from Moore, *op. cit.*, p. 564.

"The Department of State does not regard sec. 1742, Revised Statutes, forbidding diplomatic officers to be absent from their posts beyond a certain time, as requiring them to reside throughout the year at the seat of government. There are long periods in every year when, by reason of the departure of the principal members of the government from the capital or of other causes, the public interests will not suffer in consequence of the temporary residence of a minister at some other place. In such case, however, the office of the mission is to be opened as usual for the transaction of business by a secretary thereof, and the diplomatic representative is expected

to fix his residence at some point within the territories of the power to which he is accredited, from which he can visit the office without delay and can be reached by telegraph; and he must report to the Department of State where he thus established himself, the day of his departure from the seat of government, and the day of his return thereto. With this exception, a diplomatic representative will be regarded as at his post only when he is at the seat of government.

Inst. to Dip. (1897), sec. 266; see, also, sec. 267. Cited from Moore, *op. cit.*, vol. IV, p. 564.

XII. SOCIAL INTERCOURSE.

“The first care of an envoy in his relation to his mission is to make himself *persona grata* at the foreign office, and at the court or in government circles. While a self-respecting minister will never play the part of a toady, he should strive to make himself personally popular by studying the amenities of official and social intercourse, and by conformity to all innocent local customs, sentiments, and even prejudices. It is in these relations that the importance is seen of sending abroad not only men of ability but of gentlemanly accomplishments. A boor in manners, or one disagreeable instead of affable in his demeanor, can hardly expect to make himself popular in social circles, or even to be very successful in the dispatch of the business of his country.”

Foster, *op. cit.*, pp. 104–105.

“Following his reception, the American envoy has a round of official visits to make. If accredited to a royal court, there are usually certain presentations to be made to the heir apparent and other members of the royal family, and these are arranged through the master of ceremonies. This official also furnishes him a list of the higher members of the government upon whom the envoy is expected to make the first call. He likewise makes the first call upon his colleagues of the diplomatic corps. If of the grade of minister, he can not call upon the ambassadors except by appointment, which is usually made upon written application. Even a new ambassador has a certain formality to observe, which is not very clearly defined, as was shown in the case of the newly created ambassador of Mexico, whose ambassadorial colleagues declined to accept an invitation to his embassy because of the omission of some not very well understood formality; although it is possible they took that method of exhibiting their displeasure at the creation of an embassy by Mexico, it being felt by them that ambassadorial distinction should be reserved for the Great Powers of Europe.”

Foster, *op. cit.*, pp. 71–72.

"Next in importance to a good standing at the foreign office is the establishment by the envoy of friendly social relations with official and private circles. Personal acquaintance with influential people in governmental and political life is often helpful in advancing business of the legation, and in enabling the minister to ascertain and communicate to the home government the true spirit and policy of the nation. None of our American diplomats have understood better or practiced more assiduously this duty than Franklin, who became the favorite guest of public and private entertainments, and was by no means neglectful of hospitality on his part. I do not go to the length of Palmerston, in his declaration that dining is the life and soul of diplomacy, but it plays no insignificant part in the career of the successful minister. It is, therefore, apparent that the establishment which an envoy maintains, or his manner of living, is an important matter for him."

Foster, *op. cit.*, p. 115.

"In the intercourse between the Secretaries and Attorney General of this government and the ministers of foreign powers the period of the arrival of either at the seat of government is not considered. The first visit is expected from the foreign ministers. This rule, it is believed, is invariably observed by the governments of Europe, and seems to grow out of the mission itself. It is proper that the minister sent on a foreign mission should make himself known to the government to which he is addressed, and that he should extend his visit to all the chief officers of that government. It is equally correct, on any change in the members of the administration, that the first visit should be paid to those who may be brought into power. The intercourse must be opened, and that ought to be commenced by the foreign minister, the principle being the same between these parties as between the government and the foreign ministers on their first arrival in the country. The rule which prevails between persons in private life is not applicable to this case. This latter rule varies in different places, and is founded on no fixed principle."

Mr. Monroe, Sec. of State, to Mr. de Daschkoff, Mar. 9, 1813, MS. Notes to For. Legs. II, 3. Cited from Moore, *op. cit.*, vol. IV, pp. 743-744.

"Cereemonial and social duties take up a large part of a minister's time; but those who have been noted as our best and ablest representatives have always been most punctilious in their performance. No one has ever served us better than Mr. John Quincy Adams; and yet we may see from his 'Diary' that night after night he went into society, danced, played cards, talked, and ingratiated himself with the people about him. In spite of certain peculiarities derived from his Puritan ancestry, peculiarities which were sometimes disagreeable when they showed themselves, Mr. Adams was a man not only fond

of society, but very popular in society, and, in a word, combined the most useful external diplomatic qualities with those of intellect, study, and experience."

Schuyler, *American Diplomacy*, 151. Cited from Moore, *op. cit.*, vol. IV, p. 761.

XIII. INTERFERENCE IN POLITICS.

Interference in domestic politics on the part of a public minister can not be too severely reprobated. If it amounts to intervention in the internal affairs of another state, it constitutes a violation of one of the most fundamental principles of international law, namely, that of sovereignty. The following instances of breach of these principles are particularly interesting:

1. THE CASE OF GOUVERNEUR MORRIS.

"The alleged course of Gouverneur Morris when in France in rendering advice and support to the reactionary party was the cause of much embarrassment to President Washington.

"He [the President] said he considered the extracts from Ternant very serious, in short as decisive; that he saw that Gouverneur Morris could be no longer continued there consistent with the public good; that the moment was critical in our favor and ought not to be lost; that he was extremely at a loss what arrangement to make. I asked him whether Gouverneur Morris and Pinckney might not change places. He said that 'would be a sort of remedy, but not a radical one; that if the French ministry conceived Gouverneur Morris to be hostile to them; if they would be jealous merely on his proposing to visit London, they would never be satisfied with us at placing him at London permanently.'"

Cited from Moore, *op. cit.*, vol. IV, pp. 572-573.

"January 12, 1792, Washington appointed Gouverneur Morris minister plenipotentiary to France. The appointment was made by Washington not without misgivings, for while entertaining absolute confidence in Morris's integrity, he recognized, in the opposition which the nomination excited in the Senate, the fact that the possession of a 'lively and brilliant imagination' and a 'gift of ridicule' would require of Morris in the delicate situation in which he was placed the exercise of unusual caution. There was, however, another ground of opposition to Morris's appointment. 'It was urged,' said Washington, in an admonitory letter, 'that in France you were considered as a favorer of the aristocracy and unfriendly to its revolution.' In what sense this was true no one understood better than Washington, with whom Morris had for three years been in correspondence in regard to events in France. In his own country Morris

had been a supporter of the revolution, a member of the Continental Congress, assistant to Robert Morris in the management of the public finances, a member of the Constitutional Convention of 1787. To mental gifts of a high order he united a capacity for public business. In his views of government he belonged to the same school as Washington. He regarded the maintenance of a just public authority not as a menace to liberty but as its essential safeguard. In the first stages of the French Revolution he could see 'every reason to wish that the patriots may be successful,' though he apprehended that the 'crumbling matter' on which the edifice of freedom was to be erected would, when exposed to the air, 'fall and crush the builders.' He instinctively recoiled from the excesses that were committed when his apprehensions came to be fulfilled. Before he became minister of the United States he offered his counsel to Louis XVI. He afterward sought to effect that monarch's escape; and having witnesses the execution both of the King and the Queen and the destruction of all public authority, he prophesied that, whatever might be the lot of France in remote futurity, she must soon come, probably through the medium of a triumvirate or other small body of men, to be 'governed by a single despot.'

"In a letter to Washington of February 14, 1793, Morris said: 'I will not speak of my own situation; you will judge that it is far from pleasant. I could be popular, but that would be wrong. The different parties pass away like the shadows in a magic lantern, and to be well with any one of them would in a very short period become the cause of unquenchable hatred with the others.' With the progress of events Morris's situation did not become more agreeable, and at length he purchased a residence at Saintport, about thirty miles from Paris where he remained till his recall, paying such visits to Paris as the duties of his office rendered necessary. The authorities of the Republic, to whom he had never been personally grateful, took advantage of the request for Genet's recall to ask for his withdrawal. Under the circumstances this act of reciprocity was ungrudgingly conceded, although Washington did not fail to assure Morris that his confidence in and friendship and regard for him remained undiminished."

Moore, *op. cit.*, vol. IV, pp. 488-490.

For a fuller discussion of the situation in France and Morris's relation to the revolution, see Moore, *Int. Arbitrations*, pp. 4401-4414.

"During the two or three years previous to his appointment, in which he had resided in Paris, he [Morris] had identified himself, as completely as it was possible for a stranger, with the King's friends. He expressed openly his conviction that the new constitution was a failure; and, through those connected with the court, had submitted to his Majesty the draft of an address to be made

when accepting the constitution. * * * Accompanying this strange paper was a still stranger memoir. * * * Speaking of the King in the third person, Mr. Morris says: 'But it is important for him to show that he has acted consistently. And yet this should be accomplished in such a manner as to produce the effect, without appearing to intend it, because such appearance would place him in the situation of one who defends himself before his judges; and a King should never forget that he is accountable only to God.' * * * Anyone holding such opinions, and so connected, could be of no possible service either to France or the United States, in a diplomatic capacity, at that time. But Mr. Morris's interference did not end when his public character began. As minister of the United States he contrived, and very nearly accomplished, the escape of Louis XVI from Paris. He became that monarch's agent, by receiving and disbursing a large amount of money; and the unexpected balance of that fund he preserved and accounted for, after the termination of his mission. While it is impossible not to sympathize with Mr. Morris's righteous indignation at the horrors with which he was surrounded, while every instinct of common humanity would rejoice at the success of his earnest endeavor, it is impossible to justify his conduct as the diplomatic representative of the United States."

Trescott, *American Diplomatic History*, 131-135. Cited from Moore, *op. cit.*, vol. IV, p. 490.

2. THE BULWER INCIDENT.

"In the spring of 1848 Spain, which was then under the reactionary government of Narvaez, was greatly agitated by revolutionary infection from France. That Queen Isabella occupied the throne was principally due to England; English assistance had been given on the condition of constitutional government; and England was bound to a certain extent by treaty to support the existing régime. In these circumstances Lord Palmerston, the Secretary for Foreign Affairs, thought it opportune to warn the Spanish Government through Mr. Bulwer, British minister at Madrid, of what he conceived to be the danger of the course which the government was taking. The warning was violently resented, and the Spanish administration seem to have determined to rid themselves of Mr. Bulwer, whose views they knew to be in full accordance with those of his own government. Shortly afterwards his passports were sent him with an intimation that he must quit Madrid within forty-eight hours. The reason assigned for his dismissal was that he had mixed himself up with the party opposed to the existing order of things, and that he was guilty of complicity in actual revolt. As the Spanish Govern-

ment was unable to offer, and in fact did not seriously attempt to offer, any justification of their charges, Lord Palmerston responded by dismissing the Spanish minister in London."

Hall, *op. cit.*, pp. 316-317.

"Acting upon the instructions of Lord Palmerston, he warned the Spanish Government of the danger of the course it was taking in not pursuing a sufficiently liberal policy, and recommended the adoption of a legal and constitutional course of government. To this interference in its domestic affairs, Spain replied by sending Mr. Bulwer his passports with an intimation that he must leave Madrid within forty-eight hours.

"This case is particularly important because Lord Palmerston, though clearly wrong in applying them in this case, laid down the correct principles governing the conditions under which a demand for the recall of a public minister should be complied with. They are thus summarized by Lord Salisbury:

"It is, of course, open to any government, on its own responsibility, suddenly to terminate its diplomatic relations with any other State, or with any particular minister of any other State. But it has no claim to demand that the other State shall make itself the instrument of that proceeding, or concur in it, unless that State is satisfied by reasons, duly produced, of the justice of the grounds on which the demand is made. (Moore, IV, p. 538.) The reply of Secretary Bayard to this argument (pp. 539 ff.) is unconvincing. He is misled on this point by the "high authority" of Calvo."

Hershey, *op. cit.*, p. 285 n.

On the Bulwer Incident, see also Calvo, III, par. 1515. For other cases of *Interference in Politics*, see *supra*, *Dismissal of Ministers*.

XIV. RELATIONS WITH THE LEGISLATURE AND EXECUTIVE.

The public minister should ordinarily direct his communications to the foreign minister or department of state of the country to which he is accredited. He should have no direct or official relations with the legislators, nor should he attempt to influence the nation or people at large on matters political, either through the press or by means of public address.

"The question of the right of a foreign minister to criticise or comment on legislation pending in Congress in his communications to the secretary of state was made the subject of discussion recently in Congress. The Chinese minister sent a note to Secretary of State Hay in 1902, in which he took exception to the proposed legislation respecting Chinese immigration, basing his action upon a provision of the treaty of 1880 which contemplated representations of a diplo-

matic character respecting Congressional legislation. Secretary Hay sent a copy of the minister's note to both houses of Congress. In the debate on the measure the attention of the Senate was called to the Chinese minister's note as a breach of the rule which forbids diplomatic discussion of pending legislation, but the prevailing sentiment seemed to be that the provision of the treaty justified the minister's conduct."

Foster, *op. cit.*, p. 111.

"Minutes of a conversation between Mr. Jefferson, Secretary of State, and M. Genet:

"JULY 10, 1793.

"* * * He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. 'But,' said he, 'at least, congress are bound to see that the treaties are observed.' I told him no; there were very few cases, indeed, arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. 'If he decides against the treaty, to whom is a nation to appeal?' I told him the Constitution had made the President the last appeal. He made me a bow, and said, that, indeed, he would not make me his compliments on such a Constitution, expressed the utmost astonishment at it, and seemed never before to have had such an idea.

"He was now come into perfect good humor and coolness, in which state he may with the greatest freedom be spoken with. I observed to him the impropriety of his conduct in persevering in measures contrary to the will of the government, and that too, within its limits, wherein unquestionably they had a right to be obeyed. 'But,' said he, 'I have a right to expound the treaty on our side.' 'Certainly,' said I, 'each party has an equal right to expound their treaties. You, as the agent of your nation, have a right to bring forward your exposition, to support it by reasons, to insist on it, to be answered with the reasons for our exposition where it is contrary; but when, after hearing and considering your reasons, the highest authority in the nation has decided, it is your duty to say you think the decision wrong, that you can not take upon yourself to admit it, and will represent it to your government to do as they think proper; but, in the meantime, you ought to acquiesce in it, and to do nothing within our limits contrary to it.'"

10 *Washington's Writings*, 536, 537. Cited from Moore, *op. cit.*, vol. IV, pp. 680-81.

"December 20, 1793, the French minister at Philadelphia communicated to the Department of State translations of the instructions given him by the executive council of France, in order that they might be distributed among the members of Congress, and, besides

requesting that the President would lay them officially before both Houses, proposed to transmit subsequently other papers to be laid before Congress in like manner. Mr. Jefferson, after consulting the President, informed the minister that his functions as the representative of a foreign nation were confined to the transaction of the affairs of his nation with the executive of the United States; that the communications which were to pass between the executive and legislative branches could not be a subject for his 'interference'; and that the President 'must be left to judge for himself what matters his duty or the public good may require him to propose to the deliberations of Congress.'"

Mr. Jefferson, Sec. of State, to the French min., Dec. 31, 1793, 5 MS. Dom. Let. 412. Cited from Moore, *op. cit.*, vol. IV., p. 683.

"A foreign minister has a right to remonstrate *with the Executive* to whom he is accredited upon any of those measures affecting his country. But it will ever be denied as a right of a foreign minister that he should endeavor, by an address to the people, oral or written, to forestall a depending measure, or to defeat one which has been decided."

Mr. Randolph, Sec. of State, to M. Fauchet, French min., June 13, 1795, 8 MS. Dom. Let. 262.

That it is an impropriety for foreign ministers to publish criticisms on the government to which they are accredited, see 1 J. Q. Adams, *Memoirs*, 410. Cited from Moore, *op. cit.*, vol. IV, p. 681.

"A foreign minister here is to correspond with the Secretary of State on matters which interest his nation, and ought not to be permitted to resort to the press. He has no authority to communicate his sentiments to the people by publications, either in manuscript or in print, and any attempt to do so is contempt of this government. His intercourse is to be with the Executive of the United States only, upon matters that concern his mission or trust."

Lee, At. Gen., 1797, 1 op., 74. Cited from Moore, *op. cit.*, vol. IV, p. 682.

"The Chevalier Correa de Serra, having published in the *National Intelligencer*, of Washington, a notification of the blockade of Pernambuco and the adjacent coast, he was informed by the Department of State that settled and approved usage required that whatever communication he had to make relative to the alleged blockade should have been made, if at all, to the government of the United States, and not promulgated without its knowledge through the medium of newspapers. It was obvious, said the Department of State, that if the minister of a foreign power could pass by the government and address himself to the country in such a case as the present, he might do it in any other."

Mr. Rush, Sec. of State, to the Chev. Correa de Serra, Portuguese charge, May 28, 1817, MS. Notes to For. Legs., II, 229. Cited from Moore, *op. cit.*, vol. IV, p. 682.

"A foreign minister accredited to the United States has no right to ask explanations from the President concerning the debates or proceedings of Congress, or any message which he may transmit to either House in the exercise of his constitutional power and duty. In a note to M. de la Rosa, minister of Mexico, from Mr. Buchanan, Secretary of State, February 15, 1849, it is said: 'So far as regards the debates or proceedings of Congress, this is the first occasion on which it has become necessary to address the representative of any foreign government. Not so in relation to the messages of the President to Congress. Mr. Castillo, one of your predecessors, in a note of the 11th of December, 1835, to Mr. Forsyth, the Secretary of State, called upon him for an explanation of the meaning of a paragraph relating to Mexico contained in President Jackson's annual message to Congress of December, 1835. Mr. Forsyth, in his answer of 16th December, 1835, told Mr. Castillo that 'remarks made by the President in a message to Congress are not deemed a proper subject upon which to enter into explanation with the representative of a foreign government.' Mr. Livingston, then our minister to France, on the 13th of January, 1835, informed the French minister of foreign affairs that in the message of President Jackson to Congress, of the previous December, 'there was nothing addressed to the French nation,' and he likened it very properly 'to a proceeding well known in the French law—a family council, in which their concerns and interests are discussed, but of which in our case the debates were necessarily public.'"

Annual message of the President, &c., 1849-50, part 1, p. 71.

"Mr. Webster, Secretary of State, wrote to the same Mexican minister, February 21, 1851: 'The undersigned flattered himself that after the expression of the sentiments of the Government contained in the note of Mr. Buchanan to M. de la Rosa, of 15th February, 1849, M. de la Rosa would have abstained from making a message of the President to either House of Congress a subject of diplomatic representation.'"

Lawrence's Wheaton (ed. 1863), 385.

"The President's annual message is a communication from the executive to the legislative branch of the Government, an internal transaction, with which it is not deemed proper or respectful for foreign powers or their representatives to interfere, or even to resort to it as the basis of a diplomatic correspondence. It is not a document addressed to foreign governments."

Mr. Marcy, Sec. of State, to Mr. Herran, Colombian min., Dec. 22, 1856, MS. Notes to Colombia, VI, 57. Cited from Moore, *op. cit.*, vol. IV, p. 685.

"It has always been regarded as inadvisable for a diplomatic agent accredited to this Government to appeal to the public through the

press over his own signature. * * * If the Argentine legation should have cause of complaint against this government or any person in its service, this Department and not the public may most properly be addressed upon the subject."

Mr. Fish, Sec. of State, to Mr. Garcia, Argentine min., Nov. 5, 1869, MS. Notes to Argentine Leg., VI, 78. Cited from Moore, *op. cit.*, vol. IV, p. 687.

XV. INVIOABILITY OF DIPLOMATIC CORRESPONDENCE.

"In May, 1795, complaint was made to the British minister that three letters addressed to the Secretary of State of the United States by Mr. Monroe, American minister at Paris, which were on board a vessel that had been carried as a prize into Halifax, were opened in the admiralty court there by the attorney general, although they bore the American minister's official seal. Confidence was expressed that such an 'outrage' would be discountenanced and that the letters would be restored to the Department of State with information whether copies had been taken of them.

Mr. Randolph, Sec. of State, to Mr. Hammond, British min., May 21, 1795, 8 MS. Dom. Let. 200. Cited from Moore, *op. cit.*, vol. IV, p. 710.

"I heartily reprobate the outrage on the British government, in violating [by a privateer] the seals of its accredited minister to the United States, and am desirous of taking such notice of it, as the respect we owe, not only to the government of Great Britain but to ourselves, demand. I pray you, therefore, to refer this business to the attorney of the district, in the absence of the Attorney General, with instructions to make a diligent inquiry, and strictly to prosecute the persons he may find guilty of any breach of the law of nations or the land."

Mr. J. Adams, President, to Mr. Pickering, Sec. of State, July 20, 1799, 8 John Adams' Works, 668. See *id.*, 658. Cited from Moore, *op. cit.*, vol. IV, p. 711.

"On general principles, however, a government may be said to have a clear right to send its communications to its diplomatic agents in foreign countries, and its legation in one country to those in another by means of couriers, which communications should be inviolable by the authorities of the country through which they may pass. If the courier should be, as he ought to be, provided with a passport attesting his official character, and the dispatches of which he is the bearer are in his luggage, his affirmation to that effect ought, it seems to me, to exempt the latter from search, unless its bulk or other circumstances afford reasonable ground for suspicion that the courier has abused his official position for the purpose of smuggling.

"Formerly it was the practice of this department, and of the lega-

tions of the United States abroad, to issue courier passports for the mere convenience of individuals, when either there were really no dispatches to send, or, if there were, they might as well have gone by post. The abuse to which this practice led, and the consequent disrepute into which it brought the government in Europe, compelled its discontinuance many years since. The authorities of that quarter may probably be induced to withhold perhaps the customary courtesies from couriers of the United States from a recollection of their former excessive numbers. If, however, it should be understood that persons are not now employed in that capacity except upon occasions similar to those when they are employed by other governments, we would have a right to expect for our couriers the same immunities which are accorded to those of any other government."

Mr. Seward, Sec. of State, to Mr. Dayton, June 21, 1862, MS. Inst. France, XVI, 184. Cited from Moore, *op. cit.*, vol. IV, pp. 711-712.

In instructions issued in 1862, with regard to papers found on board of captured vessels, the naval officers of the United States were directed that "official seals, or locks, or fastenings of foreign authorities, are in no case, nor on any pretext, to be broken, or parcels covered by them read by any naval authorities, but all bags or other things covering such parcels, and duly seized and fastened by foreign authorities, will be, in the discretion of the United States officer to whom they may come, delivered to the consul, commanding naval officer, or legation of the foreign government, to be opened, upon the understanding that whatever is contraband or important as evidence concerning the character of a captured vessel will be remitted to the prize court, or to the Secretary of State at Washington, or such sealed bag or parcels may be at once forwarded to this Department, to the end that the proper authorities of the foreign government may receive the same without delay."

Instructions issued by the Sec. of the Navy, Aug. 18, 1862, to naval officers of the United States (Official Records of the Union and Confederate Navies, ser. 1, vol. 1, pp. 417, 418): "I entirely agree with Her Majesty's government in the principle that when a bag purporting to convey despatches on Her Majesty's service is found sealed and duly authenticated by a consul, that seal and authentication ought to be respected by the United States authorities." (Mr. Seward, Sec. of State, to Lord Lyons, British min., April 5, 1862, Dip. Cor. 1862, 258, 259.) Cited from Moore, *op. cit.*, vol. IV, p. 712.

"The American minister at Constantinople having expressed his apprehension that letters sent by him to the United States consul at Sivas, touching matters at Marsovan, had been violated, he was advised that the inviolability of the privileged correspondence between recognized agents of the United States was one of the most obvious and indispensable prerogatives of foreign diplomatic representatives,

and that any infringement of his rights in that regard would furnish occasion for earnest protest, especially if official correspondence, under his legation's seal, addressed to a subordinate officer of the United States, were opened by the Turkish agents."

Mr. Gresham, Sec. of State, to Mr. Thompson, min. to Turkey, No. 54, March 17, 1893, For. Rel. 1893, 620. Cited from Moore, *op. cit.*, vol. IV, 712-713.

XVI. UNNEUTRAL CONDUCT OF DIPLOMATIC AGENTS.

There have been a number of instances of unneutral conduct on the part of foreign diplomatic agents in the United States. Some of these have already been discussed or referred to under the head of "Dismissal of Ministers," but a few citations illustrative of the details of some of these activities may be of interest.

"Genet arrived at Charleston, S. C., April 8, 1793, and at once proceeded to fit out and commission privateers, and when he had got a number ready for sea he set out on his journey to the seat of the national government by land. On the way he incited the people to hostility against Great Britain, and received such demonstrations of sympathy as to strengthen his confidence in the success of the course on which he had entered.

"When Genet arrived in Philadelphia he was duly received by the President, but the administration was at the same time obliged to take measures for the vindication of the neutrality proclamation of April 22, 1793, which was constantly violated by the fitting out of privateers, the condemnation of prizes by French consuls sitting as courts of admiralty, and even by the capture of vessels within the jurisdiction of the United States. These proceedings, in which he was himself directly implicated, Genet defended as being in conformity not only with the treaties between the two countries but also with the principles of neutrality. When Jefferson, who was then Secretary of State, cited the utterances of writers on the law of nations, Genet repelled them as "diplomatic subtleties" and as "aphorisms of Vattel and others." The United States, however, insisted that the fitting out and arming of vessels and the enlistment of citizens of the United States should cease; that privateers that had been unlawfully fitted out and armed in the United States should depart from and not reenter their jurisdiction; that captures made in the waters of the United States, or by vessels unlawfully armed or equipped therein, should, when brought within the United States, be restored; and that the exercise of prize jurisdiction by the French consuls should be discontinued. Genet refused to admit these demands. 'I wish, sir,' he replied, 'that the Federal Government should observe, as far as in their power, the public engagements contracted by both nations; and that by this generous and prudent conduct they will

give at least to the world the example of a true neutrality, which does not consist in the cowardly abandonment of their friends in the moment when danger menaces them, but in adhering strictly, if they can do no better, to the obligations they have contracted with them." He also expressed contempt for the opinions of the President and questioned his authority.

"On the 16th of August, 1793, Morris was instructed to ask for Genet's recall. A request to this effect was made in an interview with M. Deforgues, then minister of foreign affairs, on the 8th of October. It was immediately granted; and on the 10th of October, M. Deforgues in a formal note, confirming what he had previously promised, declared that measures would be taken to show that 'the proceedings and criminal maneuvers (*les démarches et les manoeuvres criminelles*) of the citizen Genet' were not authorized by his instructions. His successor, M. Fauchet, demanded his arrest for punishment. This the United States refused 'upon reasons of law and magnanimity.'"

Moore, *op. cit.*, pp. 486-487. See, more fully, Moore, *Int. Arbitration*, V. 4404-4412. See, also, Moore's *American Diplomacy*, 38-41, 43-48.

"Although the grounds of objection to Mr. Segur were not stated in the request for his recall, they related to certain alleged attempts on his part to violate the neutrality laws of the United States in respect of a conflict between Salvador on the one side and Guatemala and Nicaragua on the other. Subsequently to his recall, Mr. Segur and certain other persons were arrested in New York and committed to Fort Lafayette, on the ground that they were endeavoring to procure a war steamer, and to purchase arms and enlist men in the United States to be employed in the war in question. The papers in the case were submitted to the Attorney General, who gave an opinion to the effect that the acts charged did not constitute an indictable offense."

Mr. Seward, Sec. of State, to Mr. Partridge, min. to Central America, No. 13, Aug. 12, 1863, MS. Inst. Am. States, XVI, 354. Moore, *op. cit.*, vol. IV, p. 500.

"In March, 1855, during the Crimean war, an office was opened in Halifax for the enlistment of recruits for the British Army. On July 6, 1855, Mr. Buchanan, American minister in London, acting under instructions, advised Lord Clarendon that the Government of the United States was constantly receiving information that persons were leaving the country under engagements, contracted within its limits, to enlist as soldiers in the British Army on their arrival in Nova Scotia; that there was good reason to believe that an extensive plan had been organized by British functionaries and agents, and was in successful operation in different parts of the Union, to

furnish recruits for the British army; that these acts had been performed in violation of the neutrality laws of the United States, and that the President desired to ascertain how far persons in official station, under the British Government, who had been concerned in the proceedings in question, had acted with or without its approbation, and what measures, if any, had been taken to restrain their unjustifiable conduct. Lord Clarendon disclaimed any intention of violating the neutrality laws of the United States, and declared that the British agents were instructed to observe them; but it appeared by his statements that his views as to what might be done in the way of making enlistments in the United States, without violating the law, were different from those of the Government of the United States. Meanwhile, prosecutions had been begun against some of the recruiting agents, and the evidence elicited at their trial deeply implicated Mr. Crampton, the British minister at Washington, and Messrs. Barclay, Mathew, and Rowcroft, British consuls, respectively, at New York, Philadelphia, and Cincinnati, as conspicuous participants in the organization and execution of the scheme of recruitment, the operation of which, as it appeared, began in January, 1855, and continued till August, when it was abandoned by order of the British Government. On December 28, 1855, Mr. Buchanan was instructed by Mr. Marcy, who was then Secretary of State, to inform the British Government that Mr. Crampton's connection with the affair had rendered him an unacceptable representative of Her Britannic Majesty, and to ask for his recall as well as for the removal of the three implicated consuls. In a note of April 30, 1856, to Mr. Dallas, who had succeeded Mr. Buchanan as minister to England, Lord Clarendon disclaimed any intention to infringe the laws or violate the sovereignty of the United States, and, as an answer to the charges made against the British minister and consuls, communicated their declarations that they had not committed any of the acts imputed to them, and expressed the hope that this response would prove satisfactory to the United States and put an end to the difference between the two governments.

"As the United States was unable to accept this conclusion, Mr. Marcy, on May 28, 1856, announced to Mr. Crampton the determination of the President to 'discontinue further intercourse' with him, and stated that the reasons which had compelled the President to take this step had been communicated to Mr. Crampton's Government. Mr. Marcy stated at the same time that due attention would be cheerfully given to any communications from the British Government which might be forwarded through any other channel, and that if Mr. Crampton should desire to retire from the United States he would be furnished with the usual facilities for that purpose. A

pass port was also enclosed to him. On the same day the President revoked the exequaturs of the three consuls.

"In instructions to Mr. Dallas of May 27, 1856, which were communicated to Lord Clarendon on the 11th of the following month, Mr. Marcy showed that Mr. Crampton, with the support of the consuls, continued to carry on the plan of recruitment for several months after he was admonished that, whatever might have been his intention, it constituted a violation of the laws of the United States, so that his moral and legal responsibility were, as Mr. Marcy maintained, fully established."

Message of President Pierce, May 29, 1856, H. Ex. Doc. 107, 34 Cong., 1st sess.; 47 Brit. and For. State Papers, 358-474; 48 id., 189-300. Cited from Moore, *op. cit.*, vol. IV, pp. 533-534.

Among acts which a neutral government is bound to use "due diligence" or (to use the language of the second Hague Conference) the "means at its disposal" to prevent are the following:

1. The levying of troops or enlistments on its territory. (This does not apply to those going to another country with the intention of enlisting or of reservists sailing as individuals.)

2. Sending out or permitting to be sent out armed expeditions.

3. The fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intent to cruise or engage in hostile operations against a friendly power, as, also, the departure from its jurisdiction of any vessel intended to cruise or engage in hostile operations, which has been adopted in whole or in part within its jurisdiction to warlike use.

4. The passage of belligerent troops through its territory.

5. The use of its territory as a base of belligerent operations.

6. The use of its public vessels as a direct aid to the belligerent for carriage of armed forces.

7. The sale of prizes within its ports, or of setting up by a belligerent, prize courts on its territory.

8. The use of its territory by a belligerent as a base for the manufacture of arms or supplies.

9. The use of its ports by belligerent warships as a base for war activities. (According to the 13th Hague Convention no more than three such vessels may be admitted to a neutral harbor at one time, and these must only remain long enough to effect necessary repairs or take on a minimum supply of coal and provisions.)

10. The sending of prisoners by a belligerent through neutral territory.

11. The use of its public vessels for purposes of directly aiding a belligerent by carrying armed forces, stores, dispatches.

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10. The sending of prisoners by a belligerent through neutral territory.

11. The use of its public vessels for purposes of directly aiding a belligerent by carrying armed forces, stores, dispatches.

12. The use on behalf of belligerents of telephonic and telegraphic cables whether these belong to it, a company or private individuals.

“What are these rights which every neutral may properly assert, but which they have guarded in such a slovenly fashion heretofore:

1. “The right to the integrity of its own territory and to prevent its misuse by foreign powers for any such operations or purposes, military or otherwise, as may embarrass a nation with which the neutral state is at peace:

2. “The right to the integrity of its bays and harbors, together with the waters which it dominates and which it is believed will shortly be conceded to cover a space along its coast far wider than the marine league honored in the United States since the days of Washington.

3. “The right to have its merchantmen and public ships pass unintercepted over the high seas, provided they commit no such breach of enemy requirements in the matter of blockade and contraband as the neutral may have conceded that belligerents are entitled to impose; this unequivocally includes the right to continue its trade with other neutrals:

4. “The right to forbid belligerent interference with neutral goods, which are not contraband, on enemy ships, or of enemy goods on neutral ships:

5. “The right to require from the belligerent courteous treatment of neutral officials and citizens, and such protection of neutral property as the non-combatant may, all other things being equal, expect in times of peace. It is of course recognized that this is subject to exigencies of war that may make it practically impossible for the belligerent to afford such police and other protection as it would gladly supply under different conditions; also that the rule is subject to the understanding that certain neutral property belonging to neutral citizens resident in enemy territory, acquires enemy character, notwithstanding the fact that it is still to a degree under the protection of a neutral government:

6. “The proper recognition of treaties, conventions, and agreements between the two nations:

7. “The right to maintain intercourse with a belligerent government or with belligerent governments without let or interference, provided the neutral perform no unneutral act:

8. “The right to insist that belligerents shall avoid doing anything in neutral territory designed to cause embarrassment if not actual injury to a friendly people. This matter will be treated separately because of its importance, and because the experiences of the United States since the fall of 1914 appear to justify a fuller treatment than it has heretofore received:

9. "The right to protect its citizens in their intercourse with belligerents, provided the former do not contravene such belligerent requirements as are sanctioned by neutral acquiescence."

Brewer, D. C., *Rights and Duties of Neutrals*, 1916, pp. 178-181.

XVII. UNFRIENDLY CONDUCT OF DIPLOMATIC AGENTS.

Recent events have greatly emphasized the importance of preventing unfriendly as well as unneutral activities on the part of foreign diplomatic agents in the countries to which they are accredited.

The activities of German agents, whether emanating from Berlin or from the German Embassy at Washington, before the outbreak of the Great War, have been particularly pernicious and fateful in their effects on the relations between the United States and Germany. It is difficult in many of these cases to distinguish between "unneutral" and "unfriendly" activities.

There are accessible official records of several cases of "unfriendly" conduct prior to the outbreak of the present war. One of these was furnished by a United States minister to Peru.

1. THE CASE OF JEWETT.

"The President regrets that you appear to be on such unfriendly terms with the Government of Peru. It is a primary duty of a diplomatic agent to cultivate the good will of the authorities of the country to which he is accredited. Without this his usefulness must be very much impaired. It is impossible that you can reform either the morals or the politics of Peru, and as this is no part of your mission, prudence requires that you should not condemn them in public conversations. You ought to take its institutions and its people just as you find them and endeavor to make the best of them for the benefit of your own country, so far as this can be done consistently with the national interest and honor.

"The Peruvian minister complains that you have not, according to custom, given him the title of excellency or honorable in communications to him. If such be the fact, I regret it. This you may consider a small matter in itself, but yet such breaches of established etiquette often give greater offense than real injuries. This is emphatically the case in regard to the Spanish race. They have ever been peculiarly tenacious in requiring the observance of such forms. However ridiculous this may appear to us, it is with them a matter of substance.

"The United States sloop of war *Dale*, Captain McKean, will carry you this despatch. She will sail to-morrow from New York to join our fleet on the northwest coast of America, and will remain at Cal-lao for a few days. I received this information at so late a period

that I have not time before her departure to prepare despatches for you on other subjects. This I shall do by the next more direct opportunity.

"In the meantime permit me to express the earnest hope of the President that you will so conduct yourself in your highly responsible position as to give no offence to the Peruvian Government which can be avoided. In pursuing this course you will best promote the interests of your country as well as your own usefulness."

Mr. Buchanan, Sec. of State, to Mr. Jewett, chargé d'affaires to Peru, June 1, 1846, MS. Inst. Peru, XV, 48. Cited from Moore, *op. cit.*, vol. IV, p. 493.

"In the intercourse between friendly nations, when the diplomatic representative of the one has rendered himself so unacceptable to the authorities of the other as to impair or destroy his usefulness, it has ever been the custom, unless under extraordinary circumstances, to yield to such a request when made in respectful and friendly terms. This practice is founded upon the principle that the great interests of nations ought not to be jeopardized merely for the sake of retaining any individual in a diplomatic station. If diplomatic agents render themselves so unacceptable as to produce a request for their recall from the government to which they are accredited, the instances must be rare indeed in which such a request ought not to be granted. To refuse it would be to defeat the very purpose for which they are sent abroad, that of cultivating friendly relations between independent nations. Perhaps no circumstance would justify such a refusal unless the national honor were involved in the question, and this can not be pretended on the present occasion.

"The principle to which I have adverted applies with peculiar force in our relations with Peru, especially during the continuance of the Mexican War. From the situation of that Republic on the west coast of America, from the number of our vessels, both national and commercial, which frequent the harbor of Callao and other Peruvian ports, from the facilities for fitting out privateers along that coast, and from the vast amount of the property of our citizens afloat on the Pacific Ocean, it is essential that we should have a chargé d'affaires at Lima who possesses the confidence and regard of the Peruvian Government. It is of great importance that the duties of neutrality and friendship should be faithfully performed by that Government to the United States, and these can not be successfully enforced by the agency of a minister against whom the Peruvian authorities have conceived so strong a prejudice, whether well or ill-founded, as to induce them to make reiterated requests for his recall.

Mr. Buchanan, Sec. of State, to Mr. Jewett, chargé d'affaires to Peru, No. 8, March 19, 1847, MS. Inst. Peru, XV, 52. Cited from Moore, *op. cit.*, vol. IV, pp. 494-495.

2. THE RECALL OF DUMBA.

"You are instructed to present immediately the following in a note to the Foreign Office:

"Mr. Constantin Dumba, the Austro-Hungarian Ambassador at Washington, has admitted that he proposed to his Government plans to instigate strikes in American manufacturing plants engaged in the production of munitions of war. The information reached this Government through a copy of a letter of the Ambassador to his Government. The bearer was an American citizen named Archibald, who was traveling under an American passport. The Ambassador has admitted that he employed Archibald to bear official despatches from him to his Government.

"By reason of the admitted purpose and intent of Mr. Dumba to conspire to cripple legitimate industries of the people of the United States and to interrupt their legitimate trade, and by reason of the flagrant violation of diplomatic propriety in employing an American citizen protected by an American passport as a secret bearer of official despatches through the lines of the enemy of Austria-Hungary, the President directs me to inform Your Excellency that Mr. Dumba is no longer acceptable to the Government of the United States as the Ambassador of His Imperial Majesty at Washington.

"Believing that the Imperial and Royal Government will realize that the Government of the United States has no alternative but to request the recall of Mr. Dumba on account of his improper conduct, the Government of the United States expresses its deep regret that this course has become necessary and assures the Imperial and Royal Government that it sincerely desires to continue the cordial and friendly relations which exist between the United States and Austria-Hungary."

Mr. Lansing, Secretary of State, to Ambassador Penfield (telegram), September 8, 1915. Cited from *Dip. Corres. between U. S. and Belligerent Governments relating to Neutral Rights and Commerce*, vol. 10, pp. 361-362.

3. RECALL OF CAPTAINS BOY-ED AND VON PAPEN.

"EXCELLENCY: Confirming my conversation with you on December first, I have the honor to state that various facts and circumstances having come to the knowledge of the Government of the United States as to the connection of Captain Boy-Ed, Naval Attaché, and Captain von Papen, Military Attaché, of the Imperial German Embassy, with the illegal and questionable acts of certain persons within the United States, the President reached the conviction that the continued presence of these gentlemen as Attachés of the Embassy would no longer serve the purpose of their mission, and would be unacceptable to this Government.

"The President, therefore, directed me to notify Your Excellency, as I did orally, that Captain Boy-Ed and Captain von Papen are no longer acceptable to the Government of the United States as Attachés of His Imperial Majesty's Embassy at Washington, and to request that Your Excellency's Government withdraw them immediately from their official connection with the Imperial German Embassy.

"As I informed you at the time of our interview, the Government of the United States deeply regrets that this action has become necessary and believes that the Imperial Government will realize that this Government has, in view of all the circumstances, no alternative course consistent with the interests of the two Governments in their relations with each other."

Mr. Lansing, Sec. of State, to the German Ambassador, December 4, 1915. Cited from *Dip. Corres.*, etc., p. 363.

"MY DEAR MR. AMBASSADOR: On December 1st I informed Your Excellency that Captain Boy-Ed, the Naval Attaché of your Embassy, and Captain von Papen, the Military Attaché, were no longer *personæ gratae* to my Government and requested that the Imperial Government immediately recall the two attachés.

"As ten days have passed without the request of this Government being complied with and without communication from you on the subject other than your personal letter of the 5th instant, which in no way affected the fact that the two attachés were unacceptable or presented a ground for delay, I feel compelled to direct your attention to the expectation of this Government that its request would be immediately granted.

"I trust, my dear Mr. Ambassador, that you appreciate the situation and will urge upon your Government a prompt compliance with the request in order that this Government may not be compelled to take action without awaiting the recall of the attachés, an action which this Government does not desire to take but will be forced to take unless the Imperial Government meets the express wish of this Government without further delay. I need not impress upon Your Excellency the desirability of avoiding a circumstance which would increase the embarrassment of the present situation."

Mr. Lansing, Sec. of State, to the German Ambassador, December 10, 1915. Cited from *Dip. Corres.*, etc., p. 364.

"MR. SECRETARY OF STATE: In reply to your note No. 1686 of the 4th of this month, I have the honor to inform Your Excellency that his Majesty the Emperor and King has been most graciously pleased to recall the Naval Attaché of the Imperial Embassy, Captain Boy-Ed, and the Military Attaché, Captain von Papen.

"I am instructed to beg Your Excellency to obtain for the above-named gentlemen and their servants, Gustav Winkow and Otto Mahlow, a safe conduct for the return trip to Germany from the Powers at war with the German Empire, and also to insure the trip of the successors of those gentlemen to the United States in the event of their being appointed by His Majesty."

The German Ambassador, J. Bernstorff, to Sec. of State, Mr. Lansing, December 10, 1915. Cited from *Dip. Corres.*, etc., pp. 364-365.

"EXCELLENCY: I have the honor to acknowledge the receipt of Your Excellency's note of the 10th instant, notifying me that His Majesty the Emperor and King has been pleased to recall Captain Boy-Ed, the Naval Attaché, and Captain von Papen, the Military Attaché, of the Imperial German Embassy, pursuant to this Government's request of the 4th instant.

"In accordance with Your Excellency's wishes, I have had the honor to request of the Powers at war with the German Empire safe conducts for these gentlemen and their servants, Gustav Winkow and Otto Mahlow. Upon the receipt of notice that His Majesty the Emperor and King has designated the successors of these gentlemen, and after the Government of the United States has decided upon their acceptability, it will be my pleasure to request the Powers at war with the German Empire to provide safe conducts for their passage to the United States."

Sec. of State, Mr. Lansing, to the German Ambassador, December 11, 1915. Cited from *Dip. Corres.*, etc., p. 365.

"MY DEAR MR. AMBASSADOR: I am advised by the British and French Ambassadors that safe conducts will be furnished to Captains Boy-Ed and von Papen for their return to Germany, it being understood that they will take the southern route to Holland. The Ambassadors request information as to the vessel and date of sailing of the two gentlemen, which I hope you will furnish at your earliest convenience. It is also understood that they will, of course, perform no unneutral act, such as carrying dispatches to the German Government."

Mr. Lansing, Sec. of State, to the German Ambassador, December 15, 1915. Cited from *Dip. Corres.*, etc., pp. 365-366.

"EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 10th instant, by which I am advised that His Majesty the Emperor has recalled Captain Boy-Ed and Captain von Papen, Naval Attaché and Military Attaché, respectively, of your Embassy, and requested to obtain for these officers a safe conduct for their return trip to Germany.

"I did not fail to place myself at once in communication with the British and French Ambassadors on the subject, and I have now

the honor to transmit to Your Excellency two authenticated sets of copies of notes from them, which I am assured will be regarded by officers of the Allied cruisers as safe conducts, provided Captain Boy-Ed and Captain von Papen follow the south route via Holland. I further enclose a passport for each of these gentlemen."

Mr. Lansing, Sec. of State, to the German Ambassador, December 18, 1915. Cited from *Dip. Corres.*, etc., p. 366.

XVIII. SECRET AGENTS AND SPIES.

"Secret political agents may be sent for the same purposes as public political agents. But two kinds of secret political agents must be distinguished. An agent may be secretly sent to another Power with a letter of recommendation and admitted by that Power. Such agent is a secret one, in so far as third Powers do not know, or are not supposed to know, of his existence. As he is, although secretly, admitted by the receiving State, his position is essentially the same as that of a public political agent. On the other hand, an agent may be secretly sent abroad for political purposes without a letter of recommendation, and therefore without being formally admitted by the Government of the State in which he is fulfilling his task. Such agent has no recognized position whatever according to international law. He is not an agent of a State for its relations with other States, and he is therefore in the same position as any other foreign individual living within the boundaries of a State. He may be expelled at any moment if he becomes troublesome, and he may be criminally punished if he commits a political or ordinary crime. Such secret agents are often abroad for the purpose of watching the movements of political refugees or partisans or of socialists, anarchists, nihilists, and the like. As long as such agents do not turn into so-called *agents provocateurs*, the local authorities will not interfere."

Oppenheim, *op. cit.*, vol. 1, p. 510.

"A diplomatic agent secretly accredited to a foreign Government is necessarily debarred by the mere fact of the secrecy with which his mission is enveloped from the full enjoyment of the privileges and immunities of a publicly accredited agent. He has the advantage of those only which are consistent with the maintenance of secrecy; that is to say, he enjoys inviolability and the various immunities attendant on the diplomatic character in so far as the direct action of the Government is concerned. Thus, his political inviolability is complete; as between him and the Government his house has the same immunities as are possessed by the house of a publicly accredited minister; and it may be presumed that no criminal process would be instituted against him where the State charges itself with the duty of commencing criminal proceedings. On the other hand, in all

civil and criminal cases in which the initiative can be taken by a private person he remains exposed to the action of the courts; though it would no doubt be the duty of the Government to prevent a criminal sentence from being executed upon him by any means which may be at their disposal consistently with the State constitution."

Hall, *op. cit.*, pp. 324-325.

"Spies are secret agents of a State sent abroad for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all States constantly or occasionally send spies abroad, and although it is neither morally nor politically and legally considered wrong to send spies, such agents have, of course, no recognized position whatever according to international law, since they are not agents of States for their international relations. Every State punishes them severely when they are caught committing an act which is a crime by the law of the land or expels them if they can not be punished. And a spy can not legally excuse himself by pleading that he only executed the orders of his Government. The latter, on the other hand, will never interfere, since it can not officially confess to having commissioned a spy."

Oppenheim, *op. cit.*, vol. 1, pp. 510-511.

"While Germany calls her spy system 'a bureau of intelligence,' its purpose is confined not merely to the gathering of information, but to the carrying out of any campaign that will be harmful to the enemy. In the United States, Germans—reservists, army officers, representatives of the German Government—have been indicted for crimes against Federal laws. These violations were committed without doubt in a self-sacrificing spirit with the aim of helping the Fatherland. Germans, or German influences, have been behind schemes in violation of neutrality laws and restraint of trade. *They have attempted arson, bribery, forgery, engaged in military enterprises, caused explosions in ships and factories, resulting in many deaths, and have set fire in ships and factories.*

"They have participated in plots against Canada, Ireland and India, all developed in the United States under the supervision of the German representatives of Berlin, though often ostensibly carried out by anarchist tools. *The activities of the German agents, multitudinous in detail and variety, all have been designed to hinder the Allies in their prosecution of the war, to cause a breach between the Allies and the United States, to embroil this country in a war and to accomplish other secret aims of the General War Staff.* In all the propaganda, German secret agents and official representatives of the German Government have had no regard for the laws of America, but, in fact, have sought to place the United States in a position of being secretly unneutral."

Jones, J. P., *America Entangled*, 1917, pp. 17-18.

"Over all the thousands of reservists, trained agents, and other spies were the men in charge of the centres of information to whom they made their report; and the three or four chief lieutenants in charge of the various and distinct line of activities into which these matters of war, finance, and commerce automatically were divided. There were practically, outside of the Chief Spy, three important executives in this country, supervising respectively the commercial, military and naval lines of information and activity. Each one of these men was surrounded by a group of experts who had charge of a subdivision of the work. All had their legal advisors, their bankers, and every sort of an expert that their special work required. Upon them fell the task of sifting and analyzing the mass of facts gathered by the spies and making reports to Berlin. Upon each one of them also fell the duty of carrying out any orders that might come from the General War Staff in Germany.

"First and foremost of the three lieutenants was Dr. Heinrich F. Albert, Privy Counselor to the German Embassy in America and Fiscal Agent of the German Empire. He directed the gathering of a huge mass of information of value to Germany concerning the financial, industrial and commercial activities of this country, and was the chief instrument through whom money reached the army of spies. Though he was the director of many activities, nothing criminal, it must be asserted in justice to him, has been traced to him.

"The military agent was Captain Franz von Papen, the attaché of the German Embassy. His work was confined specifically to the procuring of information that would be of aid to the Imperial German army and to the military tasks that might be peculiarly helpful to the army.

"The naval expert was Captain Karl Boy-Ed, another attaché of the German Embassy. He had under him, experts who made a specialty of various lines of naval matters, fortifications, coast defenses and explosives.

"The headquarters of the entire system were and are yet in New York. Dr. Albert had his office in the Hamburg-American Steamship Company's building, and he utilized at times a good part of the Hamburg-American Company's staff—a concern in which the Kaiser himself owns a large percentage of the stock. In the same building was the office of Paul Koenig, the business manager of part of Germany's spy system in America, though nominally the Superintendent of Police for the Hamburg-American line. Captain Boy-Ed had his headquarters in Room 801 of 11 Broadway, and Captain von Papen had his on the twenty-fifth floor of 60 Wall Street."

Jones, J. P., *op. cit.*, pp. 21-23.

"The spy system as practised in Europe has been introduced into America, and it is so well organized that it has become a conspiracy

against democratic institutions, a menace to our liberties and the stability of our Government."

W. H. Skaggs, *German Conspiracies in America*, 1915, p. 112.

"The German spy system has been active and virulent in the United States since the beginning of the present war. Its organization is allied with the German propaganda bureau which antedates the present war. The whole machinery of this seditious organization was put to work immediately upon the outbreak of the war. It has been tireless, unscrupulous and notoriously seditious. Allied with the German spy system have been a few of the most lawless and disreputable Irish. There have been very few lawless acts by the Irish pro-German citizens, nor have they engaged in very much seditious talk; their work has been limited to loud assertions against England and a few have indulged in bombast about 'Germany freeing Ireland.'

"The whole United States is 'spy ridden'; German spies are everywhere, engaged in every line of business, employment, trade and profession. They are always on the alert; their system extends from the most humble servant to the German Embassy at Washington. Captain Boy-Ed, Naval Attaché of the German Embassy at Washington, is under suspicion as one of the chief directors of this spy system. He is suspected of questionable activities in connection with the issuance of fraudulent United States passports and he is under suspicion of having a good deal to do with the perjured affidavits stating that the *Lusitania* was armed.

"Chicago is not only headquarters of the German press bureau and propaganda, but it is also the stronghold of the German spy system. Everything in Chicago is under German espionage. It is not possible to lodge at the hotels, eat at the restaurants, walk on the streets or ride in the cars without being under the surveillance of German spies. Neither resident nor traveler escapes their attention. They rifle the baggage of travelers, and they have every proably 'spotted.' And these things are done with perfect impunity. Neither Federal, State nor city official has the temerity to apprehend them. They have bluffed and bulldozed some of the largest business enterprises in the country. The newspapers in Chicago, with one exception, appear to be afraid of German influence. They threaten public officials and engage in all manner of traitorous acts. The activities of the German spy system have terrorized the whole community.

"German spies have attempted to blow up passenger steamers and American warships; they have placed bombs in the Senate Chamber at Washington. Boycotting and writing threatening letters are common practices of these spies. The seditious utterances of such German-Americans as Herman Ridder, Horace Brand and their co-conspirators are in a large measure responsible for the activities of

the spy system. Dr. Münsterberg and other German professors, who have carried on a pro-German campaign in America, are more adroit than some of the propagandists, but they are as dangerous as the more outspoken Germans. These seditious agitators should have been apprehended at the beginning of their lawless practices."

Skaggs, W. H., *op. cit.*, pp. 119-122.

"German espionage was established in this country many years ago. It is the German spy system and a part of the established foreign policy of the German Government. It was well organized and in full operation at the outbreak of the war between the United States and Spain. German propaganda came later and was inaugurated as Germany's 'American policy.' German propagandism is under the direction of the educational department, and its organization is complete and as efficient as the army, and it is as subservient to the will of the Emperor. Moreover, it 'has over the army the advantage of being able to operate in time of peace.'"

Skaggs, *op. cit.*, p. 130.

"A genius in espionage—'the king of sleuth hounds,' as Bismarck called him—was discovered in the person of Stieber. He was still in his twenties when he became a professional *agent provocateur*, posing among the people as a leader of the 'social revolution' and betraying his colleagues day by day to the police. He knew every trick in the game of stirring up popular feeling to the point where, without an actual outbreak, the authorities were furnished with all the excuse that they needed for acts of oppression; and in the tumultuous forties and fifties he rendered the King many conspicuous services. But it was not until he came in touch with Bismarck and won his confidence and was deputed to pave the way for the German invasion of Austria, that he became an international figure. For two years he traveled through Bohemia and Moravia, planting out spies at the points of strategic importance. Even Moltke, the most grudging of men, acknowledged the value of his work. Wherever the German armies went they found one of Stieber's agents primed with information as to the strength and position of the enemy's forces, the state of local feeling, and the resources and notabilities of the neighborhood. He was asked when the war was over whether the cost of organizing his service had been very heavy. He records in his *Memoirs* his proud reply. 'One can not,' he answered, 'set down in thalers the value either of bloodshed which has been avoided or of victories which have been secured.'

"After Sadowa he turned his attention to France. Between 1866 and 1870 he sowed in the fourteen French Departments that would be traversed by the German troops a residential army of not less than 30,000 spies. After looking over the ground, which had, of

course, already been prepared, he formulated his needs in wholesale fashion. Thus he required (1) between four thousand and five thousand farmers, market gardeners, agricultural laborers, and vine growers, for whom employment was guaranteed in advance by his agents; (2) from seven to nine thousand female domestics for service in restaurants, cafés, and hotels, the youngest and prettiest of them to be stationed in garrison towns; (3) six or seven hundred retired noncommissioned officers for whom billets were to be found in commercial or industrial offices and factories; (4) one thousand commercial travelers; (5) as many German governesses for distribution among the French official class.

"Well might he explain when an officer of the General Staff remarked in his and Bismarck's presence, 'our army is invincible,' that the proper phrase should be 'our Armies.' 'The fighting army,' he went on, 'which you lead, comes behind you. Now, my army is already in occupation of positions which it reached in silence many months ago.' And well might Bismarck indorse the retort by silently clasping the hand of the master spy.

"When the Prussians got to Versailles, nine thousand of Stieber's men were on duty in the streets; and it was to their official headquarters, where Stieber was then in residence, that the unsuspecting Jules Favre was driven when negotiating the surrender of Paris. Stieber himself waited on the French minister in the guise of a valet, brought him his cup of coffee every morning, and systematically went through his pockets, trunks, and papers."

Brooks, Sydney, *op. cit.*, pp. 254-255.

"What the present war has shown is that the system first scientifically organized by Stieber forty-five years ago has been not only maintained but expanded. For many years past, Germany has been spending on her secret service between three and four million dollars annually, that is to say, about five times as much as France and from twelve to fifteen times as much as Great Britain. The purpose to which these funds are mainly devoted is the establishment and maintenance of spies at fixed posts in potentially hostile countries. In France, where this smothered warfare has been waged most persistently and can best be studied, the principal agents are rarely Germans. They are as a rule Swiss, Belgians, and Alsatians, with a sprinkling of corrupt Frenchmen. If they are Germans, then they hasten to take out naturalization papers and to make themselves conspicuous by protestations of loyalty to the land of their adoption. But in all cases they are instructed to disguise their operations under the forms of ordinary business. They take shops, land agencies, hotels, insurance offices, and so on. They follow their calling just like everybody else in the locality. They attract no notice either by

having too much money or too little. Their businesses are soundly established and are in keeping with the requirements of the neighborhood. The expenses of starting them are borne out of the secret-service funds, and from the same source the deficits, if any, in the annual balance sheet are made good. The man in charge identifies himself with the life around him, sits on committees, makes as many friends as possible, subscribes generously to local charities, and not infrequently gets himself elected to some minor office. He is paid for his services as a spy either by an inspector who visits him in the guise of a commercial drummer and to whom he hands his reports, or by bank notes inclosed in a registered envelope and accompanied by a letter dated from Lausanne or Brussels or some equally innocuous center—never from any German town—the writer of which poses as some near relative or intimate friend gratefully discharging his financial obligations. Thus the spy is able to live in respected independence, his own master, secure against suspicion, or in any event against proof, and in a position to do his duty by his employers.

“It is spies of this class who have made the German name detestable throughout Europe. The spy who is dispatched either in war or in peace on a confidential mission to a foreign country has still an element of romance about him. . . .

“But one has, irrationally perhaps, a very different feeling toward the German battalions of residential spies. They mingle with the people whose hospitality they are all the time abusing. They become, to all appearances, their friends, are admitted to their houses, and yet are always plotting against their safety. That is a situation which, the moment it is revealed or suspected, becomes little less than fatal to the normal confidences of civilized intercourse. Spy mania, over which, I dare say, many Americans have made merry in the past few months, is a disease incomprehensible to those who have not themselves experienced its ravages. It is a madness of terror and suspicion vitiating the whole atmosphere, causing cities and whole nations to writhe under its snaky touch. But it is a madness not without cause.”

Brooks, Sydney, *op. cit.*, pp. 255-56.

XIX. GERMAN PROPAGANDA AND CONSPIRACIES.

Among the fundamental rights of states are those of self-preservation or existence and the right to sovereignty or autonomy and independence. These involve the right of the state to establish, maintain and change its own constitution or form of government, to select its own rulers and to make and modify its own laws.

This implies a corresponding duty on the part of other states to refrain from activities (including political propaganda) on foreign

territory which tend to the subversion or destruction of the institutions of another state. Any attempt, whether through accredited or unaccredited (secret) agents on the part of a state to spread its peculiar "*Kultur*" or in organized ways to propagate its ideas or institutions should be regarded as inimical and unfriendly.

"Self-preservation includes and implies the exercise of all rights necessary to safeguard the physical and moral integrity of the state, the power to remove all immediate evils, to take precautions against future danger, to take measures essential to keep intact the existence, territory, population and the social bond . . ."

"Unquestionably a state has the right to develop its resources, to increase its industrial and commercial power, to make progress in the arts and sciences, to send abroad artistic and scientific missions, to establish in foreign countries, with the consent of the local government, academies and schools intended for its nationals. Germany, England, the United States, and France have schools at Rome and Athens.

"The increase of the domestic prosperity of the state should occasion no legitimate opposition on the part of other powers. Indeed, in the ardent economic struggle which has been one of the characteristics of the 19th century, many states seek to place obstacles in the way of the commercial and industrial development of neighboring states by assuming control of the channels of foreign trade in order to increase their own riches. But it is only the exercise, on their part, of an equal right to direct their rival efforts toward the same end."

Bonfils-Fauchillet, *Manual de droit Int. Public*, pp. 153-154.

"Every sovereign state may, from the very nature of its organization, freely exercise its sovereign rights in any manner not inconsistent with the equal rights of other states. The very fact of its sovereignty implies its independence of the control of any other state. It may, therefore, exercise all rights and contract all obligations incident to its sovereignty as a separate, distinct, and independent society or political organization. These rights and obligations are limited only by the law of nature and the existence of similar rights in others. The international rights of sovereign states have, therefore, been divided into two classes: *absolute* and *conditional*, the former including those rights to which a state is entitled as a distinct being or sovereignty, and the latter including those rights to which it is entitled only under particular circumstances in its relation to others.

"The right of every sovereign state to establish, alter, or abolish its own municipal constitution and form of government, would seem to follow, as a necessary conclusion, from these premises. And from the same course of reasoning, it will be inferred, that no foreign state

can interfere with the exercise of this right, no matter what political or civil institutions such sovereign state may see fit to adopt for the government of its own subjects and citizens. Vattel says that the Spaniards invaded this right when they judged the Inca of Peru, concerning the administration of his government, by their own laws. Other examples of the same nature are to be found in the invasion of Holland by Prussia in 1787, and by France in 1792; and the annihilation of the separate independence of Poland by the joint action of Russia, Prussia, and Austria in 1815. A sovereign state may freely of its own will change from a monarchy to a republic, from a republic to a limited monarchy, or to a despotism, or to a government of any imaginable shape, so long as such change is not of a character to immediately, or of necessity, affect the independence, freedom, and security of others.

“The right of a sovereign state to the choice of its own rulers rests upon the same foundation as its right to determine the form of its own internal constitution; and the interference of a foreign state in the one case can not be justified except under the same circumstances and upon the same grounds as in the other—viz, *the immediate and pressing danger to its own independence and security*. In other words, the change must involve *external* as well as *internal* relations, in order to render foreign interference in such case justifiable, even under the most liberal and extended rules of construction. Moreover, even in the case supposed, if the danger is only remote and problematical, it would fail to make the interference justifiable in the eye of international law. * * *

“Foreign interference in the *internal* affairs of a state has sometimes been defended on the ground of a necessity on the part of the interfering states, involving their own particular security. That a right of pacific interference, and even of armed intervention, may sometimes grow out of such threatened danger to a particular state can not be doubted. In the opinion of Mr. Canning, interference is justifiable with a nation which attempts to ‘propagate, first, her principles and, afterwards, her dominion by the sword, or encourages the subjects of another to resist authority, or assist rebellious projects.’ So, also, there may be an impending danger, affecting the general security of nations, which may justify an interference on their part, for the security of their own independence and the preservation of peace. But such danger must be threatening and immediate, and not a mere remote contingency; and even then the interference must be limited to the removal of the danger itself; beyond that it would be unlawful.”

Halleck, *op. cit.*, vol. 1, pp. 100-102.

“Since the beginning of the war German officials in the United States have engaged in many improper activities in violation of the

laws of the United States and of their obligations as officials in a neutral country. Count von Bernstorff, the German ambassador, Capt. von Papen, military attaché of the embassy, Capt. Boy-Ed, naval attaché, as well as various consular officers and other officials, were involved in these activities, which were very widespread.

"The following instances are chosen at random from the cases which have come to the knowledge of the Government.

"1. By direct instructions received from the foreign office in Berlin the German Embassy in this country furnished funds and issued orders to the Indian independence committee of the Indian Nationalist Party in the United States. These instructions were usually conveyed to the committee by the military information bureau in New York (Von Igel) or by the German consulates in New York and San Francisco.

"Dr. Chakrabarty, recently arrested in New York City, received, all in all, according to his own admission, some \$60,000 from Von Igel. He claims that the greater portion of this money was used for defraying the expenses of the Indian revolutionary propaganda in this country, and, as he says, for educational purposes. While this is in itself true, it is not all that was done by the revolutionists. They have sent representatives to the Far East to stir up trouble in India and they have attempted to ship arms and ammunition to India. These expeditions have failed. The German Embassy also employed Ernest T. Euphrat to carry instructions and information between Berlin and Washington under an American passport.

"2. Officers of interned German warships have violated their word of honor and escaped. In one instance the German consul at Richmond furnished the money to purchase a boat to enable six warrant officers of the steamer *Kronprinz Wilhelm* to escape after breaking their parole.

"3. Under the supervision of Capt. von Papen and Wolf von Igel, Hans von Wedell and subsequently, Carl Ruroede maintained a regular office for the procurement of fraudulent passports for German reservists. These operations were directed and financed in part by Capt. von Papen and Wolf von Igel. Indictments were returned, Carl Ruroede sentenced to the penitentiary, and a number of German officers fined. Von Wedell escaped and has apparently been drowned at sea. Von Wedell's operations were also known to high officials in Germany. When Von Wedell became suspicious that forgeries committed by him on a passport application had become known, he conferred with Capt. von Papen and obtained money from him wherewith to make his escape.

4. "James J. F. Archibald, under cover of an American passport and in the pay of the German Government through Ambassador

Bernstorff, carried dispatches for Ambassador Dumba and otherwise engaged in unneutral activities.

5. "Albert Sanders, Charles Wunnonberg, and others, German agents in this country, were engaged, among other activities, in sending spies to England equipped with American passports, for the purpose of securing military information. Several such men have been sent. Sanders and Wunnonberg have plead guilty to indictments brought against them in New York City, as has George Voux Bacon, one of the men sent abroad by them.

6. "American passports have been counterfeited and counterfeits found on German agents. Baron von Cupenberg, a German agent, when arrested abroad, bore a counterfeit of an American passport issued to Gustav C. Roeder; Irving Guy Ries received an American passport, went to Germany, where the police retained his passports for 24 hours. Later a German spy named Carl Paul Julius Hensel was arrested in London with a counterfeit of the Ries passport in his possession.

7. "Prominent officials of the Hamburg-American Line, who under the direction of Capt. Boy-Ed, endeavored to provide German warships at sea with coal and other supplies in violation of the statutes of the United States, have been tried and convicted and sentenced to the penitentiary. Some 12 or more vessels were involved in this plan.

8. "Under the direction of Capt. Boy-Ed and the German consulate at San Francisco, and in violation of our law, the steamships *Sacramento* and *Mazatlan* carried supplies from San Francisco to German war vessels. The *Olsen* and *Mahoney*, which were engaged in a similar enterprise, were detained. The money for these ventures was furnished by Capt. Boy-Ed. Indictments have been returned in connection with these matters against a large number of persons.

9. "Werner Horn, a lieutenant in the German Reserve, was furnished funds by Capt. Franz von Papen and sent with dynamite, under orders to blow up the International Bridge at Vanceboro, Me. He was partially successful. He is now under indictment for the unlawful transportation of dynamite on passenger trains and is in jail awaiting trial following the dismissal of his appeal by the Supreme Court.

10. "Capt. von Papen furnished funds to Albert Kaltschmidt, of Detroit, who is involved in a plot to blow up a factory at Walkerville, Canada, and the armory at Windsor, Canada.

11. "Robert Fay, Walter Scholtz, and Paul Daeche have been convicted and sentenced to the penitentiary and three others are under indictment for conspiracy to prepare bombs and attach them to allied ships leaving New York Harbor. Fay, who was the principal

in this scheme, was a German soldier. He testified that he received finances from a German secret agent in Brussels, and told von Papen of his plans, who advised him that his device was not practicable, but that he should go ahead with it, and if he could make it work he would consider it.

12. "Under the direction of Capt. von Papen and Wolf von Igel, Dr. Walter T. Scheeld, Capt. von Kleist, Capt. Wolpert, of the Atlas Steamship Co., and Capt. Rode, of the Hamburg-American Line, manufactured incendiary bombs and placed them on board allied vessels. The shells in which the chemicals were placed were made on board the steamship *Frederick der Grosse*. Scheele was furnished \$1,000 by von Igel wherewith to become a fugitive from justice.

13. "Capt. Franz Rintelen, a reserve officer in the German Navy, came to this country secretly for the purpose of preventing the exportation of munitions of war to the allies and of getting to Germany needed supplies. He organized and financed Labor's National Peace Council in an effort to bring about an embargo on the shipment of munitions of war, tried to bring about strikes, etc.

14. "Consul General Bopp, at San Francisco, Vice Consul General Von Schaick, Baron George Wilhelm von Brincken (an employee of the consulate), Charles C. Crowley, and Mrs. Margaret W. Cornell (secret agents of the German consulate at San Francisco) have been convicted of conspiracy to send agents into Canada to blow up railroad tunnels and bridges, and to wreck vessels sailing from Pacific coast ports with war material for Russia and Japan.

15. "Paul Koenig, head of the secret-service work of the Hamburg-American Line, by direction of his superior officers, largely augmented his organization and under the direction of von Papen, Boy-ed, and Albert carried on secret work for the German Government. He secured and sent spies to Canada to gather information concerning the Welland Canal, the movements of Canadian troops to England, bribed an employee of a bank for information concerning shipments to the allies, sent spies to Europe on American passports to secure military information, and was involved with Capt. von Papen in plans to place bombs on ships of the allies leaving New York Harbor, etc. Von Papen, Boy-ed, and Albert had frequent conferences with Koenig in his office, at theirs, and at outside places. Koenig and certain of his associates are under indictment.

16. "Capt. von Papen, Capt. Hans Tauscher, Wolf von Igel, and a number of German reservists organized an expedition to go into Canada, destroy the Welland Canal, and endeavor to terrorize Canadians in order to delay the sending of troops from Canada to Europe. Indictments have been returned against these persons. Wolf von Igel furnished Fritzen, one of the conspirators in this case, money on which to flee from New York City. Fritzen is now in jail in New York City.

17. "With money furnished by official German representatives in this country, a cargo of arms and ammunition was purchased and shipped on board the schooner *Annie Larsen*. Through the activities of German official representatives in this country and other Germans a number of Indians were procured to form an expedition to go on the steamship *Maverick*, meet the *Annie Larsen*, take over her cargo, and endeavor to bring about a revolution in India. This plan involved the sending of a German officer to drill Indian recruits and the entire plan was managed and directed by Capt. von Papen, Capt. Hans Tauscher, and other official German representatives in this country.

18. "Gustav Stahl, a German reservist, made an affidavit which he admitted was false, regarding the armament of the *Lusitania*, which affidavit was forwarded to the State Department by Ambassador Bernstorff. He plead guilty to an indictment charging perjury, and was sentenced to the penitentiary. Koenig, herein mentioned, was active in securing this affidavit.

19. "The German embassy organized, directed, and financed the Hans Libeau Employment Agency, through which extended efforts were made to induce employees of manufacturers engaged in supplying various kinds of material to the allies to give up their positions in an effort to interfere with the output of such manufacturers. Von Papen indorsed this organization as a military measure, and it was hoped through its propaganda to cripple munition factories.

20. "The German Government has assisted financially a number of newspapers in this country in return for pro-German propaganda.

21. "Many facts have been secured indicating that Germans have aided and encouraged financially and otherwise the activities of one or the other factions in Mexico, the purpose being to keep the United States occupied along its borders and to prevent the exportation of munitions of war to the allies; see, in this connection, the activities of Rintelen, Stallforth, Kopf, the German consul at Chihuahua, Krum-Hellen, Felix Somerfield (Villa's representative at New York), Carl Heynen, Gustav Steinberg, and many others."

Report from the Committee on Foreign Affairs to the House of Representatives, No. 1, 65th Congress, 1st Session, pp. 5-9.

"There have been two kinds of German propaganda. One, devoted to setting before the American people Germany's side of the war, may be classed as legitimate. The other has been illegal and criminal.

Jones, J. P., *In Foreword to America Entangled*, 1917, p. xi.

"German propagandism in this country had at the beginning a perfect organization. As stated by the American correspondent of *The Field*, London, Dr. Dernburg established headquarters in the offices of the Hamburg-American Line, and took over the staff of

that office and had at his disposal agents in every town of any importance in the United States. Through this important connection he was able to reach practically every business interest in the United States. But the work was not limited to business interests; it had allied associations reaching every class of citizens. Its Press Bureau is the most complete and comprehensive organization that has ever undertaken to influence public opinion in this country. With information in detail relating to national, state and local affairs, it has been able to reach the strong and weak points, the affiliations and prejudices of practically every citizen of this country. It has been supplied with the name and address of every American who has registered at a German university during the past twenty years, and to these Americans have been sent letters and literature defending German methods and upholding German policies with the usual appeal for support and sympathy.

"Dr. Dernburg came to America the third or fourth week of the war. He had the active cooperation of great financial and commercial institutions and a large number of German periodicals and newspapers, including several old American papers in the Middle West, which have been under Germanic influence. His country has fewer friends in America than it had when he began his work. Practically every leading magazine, periodical and newspaper east of Pittsburgh and, with few exceptions, all west of Pittsburgh, are pro-Ally. More than four-fifths of the faculty of every American college are with the Allies. The substantial support which Germany has in this country, other than the hyphenated Americans, their co-conspirators and hirelings, is found with the whisky trust, the most lawless and corrupt industry in America. The bumptious policy, the sheer impudence of the German Ambassador, is without precedent in American diplomacy. The German Empire has no representative in America for whom the people have any respect and in whom they have any confidence.

"Dr. Dernburg and his bureau found enthusiastic supporters in the most irreconcilable group of Irish patriots. Joint Irish-American meetings were held from the Atlantic to the Pacific. Certain Irish papers, such as *The Gaelic American*, in New York, whose editor, John Devoy, had served five years in an English prison for Fenianism, began denouncing John Redmond as a traitor and demanding a German invasion of Ireland. From Dr. Dernburg's office tons of literature found its way into the mails. Most Americans of prominence received pamphlets on 'the truth about the war,' and documentary evidence purporting to prove that Belgium got just about what she deserved."

"The story of German propagandism in America and German-Americans' agitation against the best interests of this country are not limited to the events of the present war. They are a part of American history. During many years German-American Leagues have been well organized and have systematically taken advantage of every opportunity to embarrass this country in its foreign relations, and especially when international questions demanded wise and delicate treatment by our State Department and the sober and patriotic support of the Government by the people. If these hyphenated Americans have any respect for American institutions, or any patriotic interest in the country of which they are citizens, they fail to show such feeling and interest when the country needs their support."

Skaggs, W. H. *op. cit.*, p. 198.

"The hyphenated Americans and German propagandists have tried to embroil this country in a war with Japan, hoping to force us into the European war on the German side. During many years there has been a well-recognized plan to create prejudice in America against the Slavic races, for the purpose of involving America in trouble with Russia, which as a matter of course, would be to Germany's advantage. A war between the United States and Russia would have given Germany the opportunity she desired: she could have selected either belligerent as an ally."

Skaggs, W. H. *op. cit.*, p. 201.

"An especially belligerent advocate of the German cause is the weekly newspaper, the *Fatherland*. Mr. George Sylvester Viereck, hitherto chiefly known as a poet of eroticism, established this enterprise on the ninth day of mobilization. Soon after Dr. Dernburg's arrival this paper was moved up to 1123 Broadway, in an office generally regarded as part of the Dernburg suite. From the beginning, the *Fatherland* has vituperatively abused most things American. It is only necessary to quote its reference to certain leaders of American thought to appreciate the delicacy with which it has preached its cause. The ex-president of our most venerable University is called 'sleek old Eliot, who bartered away his reputation and the prestige of his University for a five-foot bookshelf.' Our Secretary of State becomes Sir William J. Bryan; he is 'silly and dishonest'; and constant reference is made to the fact that his daughter is the wife of a British Army captain. President Wilson is 'the weak-kneed sophist in the White House,' and columns are given to denouncing him and his policies. Indeed, any prominent citizen who whispers a word against Germany is sure to have a vituperative paragraph in the *Fatherland*."

World's Work, June, 1915.

On February 10th, 1915, George Sylvester Viereck, Editor of the *Fatherland*, uttered such words of insolence and impudence as follow:

"We are tired of playing the part of Cinderella in American politics. We claim our seats at the banquet table. . . . We shall rewrite the word *American*, to the extent of our power, in terms of our own ethnic conception. . . . You have sown the storm, you shall reap the whirlwind. You have refused to listen to our reasoning. You were deaf to our pleas. Now the ballot shall speak for us. We shall go into the arena of politics. We shall try to beat you at your own game. One hundred and seventy Members of Congress are of Irish extraction. There is no reason why they should not be joined by one hundred and seventy of German extraction. There is no reason why we should not labor for the election of men of our own blood who are in accord with our principles, which are also the principles of true Americanism."

"Any one who before the end of August, had seen fit to declare in the language of the old almanacs, 'about this time we may expect' a strong German movement for peace, could have earned reputation as a prophet very cheaply and with slight risk of failure. The grounds for this prediction, now in course of fulfillment, were sufficiently obvious. The third great attempt on the part of the Germans to reach Paris had disastrously failed. The offensive, moreover, had passed to the Allies, and the German armies were then and are now being steadily forced back, with enormous losses in killed and wounded, in prisoners, in guns, and in war material. It is therefore not surprising that Germany has already begun a strong movement for peace, in order to secure, if possible, the territory which she has seized and the property which she has stolen. For this movement, backed up by all the machinery of German propaganda, we ought to be prepared in mind and spirit and in all we say and do, just as much as our armies must be supported and prepared for the German attacks upon the field of battle.

"The first step for preparation is to understand thoroughly German methods of propaganda, and very few people know in detail what a vast organization Germany has built up, both before the war and since it began, for these purposes. Any one who wishes in some measure at least to realize the extent and power of German propaganda should read an article in the *Quarterly Review* of July, 1918, reprinted in the *Living Age* of August 31, by Mr. Lewis Melville upon 'German Propagandist Societies.' It is impossible to give here even a summary of an article which fills nearly twenty pages of the *Quarterly Review* and which even then is admittedly incomplete. Not only does Germany have official propaganda proceeding from special bureaus of the Foreign Office, the War Office, and the Ad-

miralty, but it has also a press department for the purpose of influencing neutral countries, presided over by the well-known Catholic member of the Reichstag, Doctor Matthias Erzberger. These government agencies, powerful as they are, form, however, but a very small part of the organizations devoted to the promotion of German interests abroad. Some of the latter, formed long before the war for industrial and commercial purposes, have devoted themselves in the last four years exclusively to aiding the war. The most important perhaps is the German Oversea and Transoceanic Service, now divided into two societies, which furnishes news, pictures, pamphlets, and material of all sorts in all languages and in all countries.

"In addition to this there are other industrial and commercial associations with like aims and special organizations for most of the countries of the world, all working toward the same end. There are separate societies, for example, organized to carry on propaganda in Turkey, Bulgaria, Asia Minor, China, India, the countries of South America, and all this in addition to the general work being done in the United States and in the Allied countries. This vast and intricate machinery for affecting public opinion has shrunk from no expenditure and from no form of treachery and corruption. The army of agents, informers, spies, and criminals thus employed is led and directed by ambassadors, ministers, and officers of high military rank. Where, for example, they have had no friendly newspapers they have not hesitated to subsidize or even to buy outright newspapers which would serve their purpose. They have innumerable agents and the propaganda is not only of the most insidious but of the most poisonous character with a system of organized falsehood which it is difficult accurately to describe or even to imagine. It appears in the most innocent forms as well as in the most flagrant lying. . . .

"How effective this foul propaganda has been is made painfully evident by its success in Russia, where it found because of popular ignorance a peculiarly congenial soil, and where it has brought about a so-called government headed by its own agents, which has drenched the land in the blood of murdered men and women, which has thrown the country into anarchy and for the time being at least wrecked it as a military factor. The Italian retreat at the Isonzo was due to treachery, brought about by the same unscrupulous and infamous methods."

Lodge, H. C., *Scribner's Magazine*, November, 1918, pp. 620-621.

"In most countries propaganda is more or less of an accident, but in Germany it is a science. There the greatest importance is attached to propaganda, and it is developed with Teutonic thoroughness. Official propaganda in Germany is issued by the different Government departments, by the Foreign Office, the War Office, and the

Admiralty, each of which has a special section for the purpose. There is also a Press Department for influencing Neutral Countries (*Presseabteilung zur Beeinflussung der Neutralen*), presided over by the well-known Roman Catholic member of the Reichstag, Dr. Matthias Erzberger. A vast amount of propaganda, however, is done by those private organizations, many of them established long before the war, which originated in the desire of the German industrialists to encourage commercial relations between Germany and foreign countries, and to influence public opinion abroad in favor of German interests. These have combined to form an Union of German Associations for Economic Activity in Foreign Countries (*Verband Deutsch-Ausländischer Wirtschaftsvereine*) for the settlement of questions jointly affecting them—a very useful scheme, but one from which little has resulted, owing to the divergence of interests between the constituent bodies. Besides the purely economic associations, there are others which concern themselves only indirectly with trade, and whose primary aim is to spread *Kultur* in foreign countries. Since the outbreak of war, these associations have worked hand in hand, devoting themselves but little to their original functions, and, together with those more recently founded, giving all their energies to furthering the general propaganda of the Fatherland. It is to an examination of these societies and their labors that this article is confined.”

Quarterly Review, July, 1918, p. 70.

“Within the limits of this article it is impossible to give full particulars of all the German propagandist societies, but enough has been said to show what an enormous amount of trouble they have taken, and what vast sums they must have expended. The entire world has, through the agency of these institutions, been told that Germany is the greatest country in the world, the Germans the most wonderful people in the world, and German *Kultur* the last note in civilization. Wherever you go, in neutral countries, you will find a paper uttering the most violent pro-German sentiments; and, if you are behind the scenes, you can with little difficulty estimate what the expression of these sentiments costs the Fatherland.

“The United States, China, and the republics of Central and South America, in particular, have been wooed persistently—with what result the whole world knows.

China, the United States, Cuba, Panama, Guatemala, Costa Rica, and Brazil have declared war on Germany; Bolivia, Honduras, and Nicaragua have severed diplomatic relations. How great a blow this must be, can be imagined from the fact that, at the first annual meeting of the German Economic Union for South and Central America, held at Berlin, September 1, 1915, Herr G. Maschke, presi-

dent of the German-Brazilian Commercial Association, stated that 'South and Central America are are greatest assets overseas.'"

The Quarterly Review, July, 1918, pp. 86-87.

"What right has a neutral government in the premises?"

1. "The right to insist that the belligerent with which it is at peace, should not only abstain from interference with a friendly Power's internal concerns, but should—

(a) rigorously handle diplomatic representatives who volunteer the sort of destructive service which may at any moment offer a *casus belli*;

(b) use its good offices in discouraging its subjects resident in neutral territory from the performance of such reprehensible practices.

2. "The right to handle alien malefactors already amenable to her municipal law, with special severity, as open to a charge which criminals, who are citizens of the neutral State, are not suspected of, viz., levying war upon the aggrieved sovereignty, and therefore guilty of a felony which is akin to piracy."

Brewer, D. C., *op. cit.*, pp. 197-198.

XX. OFFENSES AGAINST DIPLOMATIC AGENTS. (SEE NATIONAL JURISDICTION.)

XXI. PROTECTION OF DIPLOMATIC AGENTS (INVIOABILITY).

"The main special right or privilege of diplomatic agents is that of inviolability or exemption from restraint, injury, or interference. This principle, based originally upon the supposed sacred character of the herald or envoy and sanctioned by religion, was one of the oldest and most fundamental 'laws of all mankind' known to the ancients. It extends to the family and suite as well as to the person of the agent and applies to all things or persons necessary for the accomplishment of his mission, such as his residence, furniture, carriages, archives, couriers, and correspondence. It begins as soon as the envoy enters the country to which he is accredited, and only ends when he leaves it, even in case of a rupture or suspension of diplomatic relations. . . .

"Except in cases of necessity or self-defense, the right to inviolability in the country which receives them, is nearly absolute. In most countries public ministers are protected by special laws. In any case there is an obligation to punish violations of this principle of the Law of Nations on the part of individuals. If an infraction is committed by the government itself or by one of its officials, suitable reparation by way of explanation, apology, indemnity, etc., must be made."

Hershey, *op. cit.*, pp. 286-288.

“The act of sending a minister by the one, and of receiving him by the other, amounts to a tacit compact between the two states, that he shall be subject only to the authority of his own government. The inviolability of the minister is founded upon mutual utility, growing out of the necessity that such officers and agents should be entirely independent of the local authority, in order to properly fulfil the duties of their mission. Hence, the fiction of *extra-territoriality* has been invented, by which the minister, though actually in a foreign country, is considered still to remain within the territory of his own state. He continues subject to the laws of his own country, both with respect to his personal *status* and his rights of property; and his children, though born in a foreign country, are considered as natives. ‘A respect due to sovereigns,’ says Vattel, ‘should reflect on their representatives, and chiefly on their ambassadors, as representing their master’s person in the first degree. Whoever affronts or injures a public minister commits a crime the more deserving a severe punishment, as thereby the sovereign and his country might be brought into great difficulties and trouble. It is just that he should be punished for his fault, and that the state should, at the expense of the delinquent, give a full satisfaction to the sovereign affronted in the person of his minister. If a foreign minister offended a citizen, the latter may oppose him without departing from the respect due to the character, and give him a lesson which shall both efface the strain of the outrage and expose the author of it. The person offended may further prefer a complaint to his sovereign, who will demand of the minister’s master a just satisfaction. The great concerns of the state forbid the citizen, on such occasions, to entertain those thoughts of revenge which the point of honour might suggest, though otherwise allowable. Even according to the maxims of the world; a gentleman receives no disgrace by an affront for which it is not in his power, of himself, to procure satisfaction. The necessity and right of embassies being established, the inviolability of ambassadors and other public ministers is a certain consequence of it; for if their person be not protected from violence of every kind, the right of embassies becomes precarious, and the success very uncertain. A right to the end is the right to the necessary means. Embassies, then, being of such great importance in the universal society of nations, and so necessary to their common well-being, the person of ministers charged with this embassy is to be *sacred and inviolable* among all nations.’”

Halleck, *op. cit.*, pp. 357–358.

“*Inviolability*.—This term implies a higher degree of protection to the person of a diplomatic agent and his belongings than is accorded to a private person. It is the source of the exemption from the local criminal and civil jurisdiction, as well as of other exemptions, which will be found treated of further on. In some countries, especially

France, Germany and Great Britain, special legislation is provided to ensure this inviolability. It extends to the wife and children of the diplomatic agent, to official and nonofficial members of the mission, to the servants of the agent and of the other persons here enumerated, to his house, carriages, movable property belonging to him as agent (including, of course, government furniture), archives, documents of whatever sort, and to his official correspondence carried by his couriers or messengers employed by his government. It is doubtful, however, whether his official correspondence through the post office would escape examination in countries where that practice is still carried on. The state archives of every country doubtless possess, in the shape of intercepted despatches, evidence that it was quite common in the eighteenth century, and there seems to be no reason to suppose that it has been altogether abandoned.

"Of course, an agent can not expect to enjoy inviolability when he commits an illegal act necessitating the immediate application of personal restraint; for instance, if curiosity induced him to break through the cordon of police drawn round a burning building, or if he exceeded the legal limit of speed when motoring on a high road or through the streets. It may be generally said that the condition of his personal inviolability is the correctness of his own conduct, just as if he were a private individual.

"The right in question attaches from the moment that he has set foot in the country to which he is sent, if previous notice of his mission has been imparted to the government of the receiving state, or, in any case, as soon as he has made his public character known by the production either of his passport or of his credentials. It extends, at least so far as the state to which he is accredited is concerned, over the time occupied by him in his arrival, his sojourn and his departure."

"It is not affected by the breaking out of war between his own country and that to which he is sent.

"In the case mentioned in the immediately preceding paragraph it is the duty of the government to which he was accredited, to take every precaution against insult or violence directed against him or any of the persons, whether belonging to his family or suite, covered by his right of inviolability, or against his residence or baggage, and to escort him to the frontier or to his place of embarkation with the most careful courtesy. To place him under military guard or to threaten him with the use of armed force if he looks out of the window of the railway carriage in which he is traveling is a gross violation of international decency."

Satow, *op. cit.*, pp. 242-244.

"It is proper to distinguish between the *inviolability* of the public minister and the legal fiction of his *extra-territoriality*. The former

is not a consequence of the latter, but the latter was invented for the purpose of giving security to the former. The mere fact of a public minister being regarded as a foreigner, resident in a foreign country, would not, of itself, necessarily exempt him from local jurisdiction. Article 14 of the Code Napoleon provided for bringing before the French tribunals a foreigner resident in a foreign country, even for engagements contracted in a foreign country with a Frenchman. If, therefore, the exemption of the minister depended upon his extra-territoriality, or implied foreign residence, he might still be subject to local jurisdiction. The true basis of all diplomatic privilege consists in the idea of inviolability which international jurisprudence attaches to his person and his office, and from which it can not be severed. This idea of inviolability is an inherent and essential quality of the public minister, and the office can not exist without it. International law has conferred it upon the state or sovereign which he represents, and to divest him of that quality is to divest him of his office, as the two are inseparable. Not so with respect to the fiction of extra-territoriality. So far as that is necessary to the exercise of his functions, or, in other words, to secure his inviolability, it is not an essential quality of the public minister, and therefore may be dispensed with by renouncement or otherwise. It will be seen, hereafter, that this distinction, which is made by the best writers on public law, leads to very important results. As a consequence of the sacredness and inviolability of the person of a public minister, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. This exemption commences the moment he enters the territory of the state to which he is sent, and continues, not only during the whole time of his residence, but until he leaves the country, or at least till he loses his official character, and the protection due to his office. The state to which he is accredited may at any time require him to leave, either before or after his recall by his own government. Sometimes the period within which he must leave is designated in his letter of dismissal; and, at the termination of that period, the protection due to his office necessarily ceases."

Halleck, *op. cit.*, pp. 358-361.

"Diplomatic envoys are just as sacrosanct as heads of states. They must, therefore, on the one hand, be afforded special protection as regards the safety of their persons, and, on the other hand, they must be exempted from every kind of criminal jurisdiction of the receiving states. Now the protection due to diplomatic envoys must find its expression not only in the necessary police measures for the prevention of offences, but also in specially severe punishments to be inflicted on offenders. Thus, according to English Criminal Law, every one is guilty of a misdemeanour who, by force or personal restraint, violates any privilege conferred upon the diplomatic repre-

sentatives of foreign countries, or who sets forth or prosecutes or executes any writ or process whereby the person of any diplomatic representative of a foreign country or the person of a servant of any such representative is arrested or imprisoned. The protection of diplomatic envoys is not restricted to their own person, but must be extended to the members of their family and suite, to their official residence, their furniture, carriages, papers, and likewise to their intercourse with their home states by letters, telegrams, and special messengers. Even after a diplomatic mission has come to an end, the archives of an Embassy must not be touched, provided they have been put under seal and confided to the protection of another envoy. . . .

“As diplomatic envoys are sacrosanct, the principle of their inviolability is generally recognised. But there is one exception. For if a diplomatic envoy commits an act of violence which disturbs the internal order of the receiving state in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or in case he conspires against the receiving state and the conspiracy can be made futile only by putting him under restraint, he may be arrested for the time being, although he must in due time be safely sent home. Thus in 1717, the Swedish Ambassador Gyllenborg in London, who was an accomplice in a plot against King George I, was arrested and his papers were searched. In 1718 the Spanish Ambassador Prince Cellamare, in France, was placed in custody because he organised a conspiracy against the French Government. And it must be emphasised that a diplomatic envoy can not make it a point of complaint if injured in consequence of his own unjustifiable behaviour, as for instance, in attacking an individual who in self-defense retaliates, or in unreasonably or wilfully placing himself in dangerous or awkward positions, such as in a disorderly crowd.”

Oppenheim, *op. cit.*, pp. 457-460. For full report of the classic cases of Count Gyllenborg, Swedish Ambassador to England (1717) and the Prince of Cellarmare, the Spanish Ambassador to Paris (1718), which are cited in nearly all the treatises, see 1 *ch. de Martens, Causes celebres*, 75-138 and 139-173.

1. OF PERSON.

“As in war, the bearers of flags of truce are sacred, or else wars would be interminable; so in peace, ambassadors, public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station.”

President Filmore, annual message, Dec. 2, 1851, H. Ex. Doc. 2, 32 Cong., 1 sess., 7. Cited from Moore, *op. cit.*, vol. IV, p. 622.

“The *person* of a public minister is sacred and inviolable. Whoever offers any violence to him not only affronts the sovereign he

represents but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world. . . .

"The *comités* of a minister, or those of his *train*, partake also of his inviolability. The independency of a minister extends to all his household; *these* are so connected with him that they enjoy his privileges and follow his fate. The *secretary* to the embassy has his commission from the sovereign himself; he is the most distinguished character in the suite of a public minister, and is in some instances considered as a kind of public minister himself.

McKean, Chief Justice, *Respublica v. De Longchamps*, Court of Oyer and Terminer at Philadelphia, 1784 (1 Dallas, 111, 116).

"A riot before the house of a foreign consul by a tumultuous assembly, requiring him to give up certain persons supposed to be resident with him, and insulting him with improper language, is not an offense within the act of the 30th of April, 1790, which prescribes the punishment 'for any infraction of the law of nations, by offering violence to the person of an ambassador *or other public minister.*'"

Bradford, At. Gen., 1794, 1 Op., 41.

"General Alvear, the Argentine minister in the United States, having complained of an assault committed in the city of New York on the person of his son, who was also secretary of the Argentine Legation, the Department of State, in the name of the President, expressed regret for the occurrence and sympathy for its victim, and added that, while the assailant was understood to have been held to bail by a court of the State of New York, the United States attorney for the southern district of New York would be 'instructed to proceed against him also and to commence such process as the laws of nations and of the United States authorize.'"

Mr. Webster, Sec. of State. to Gen. Alvear, Sept. 16, 1841, MS.

Notes to Argentine Leg., VI, 8. Cited from Moore, *op. cit.*, vol. IV, pp. 623-624.

"A note of Baron von Gerolt, Prussian Minister, of June 18, 1852, relative to the violence threatened or committed on him or his household by a German named Duplessis, 'having been referred to the Attorney General of the United States for his opinion as to the right of a justice of the peace to issue a warrant for the arrest of an individual upon the mere declaration, unaccompanied by an oath, of a member of the diplomatic body,' the Attorney General gave an opinion justifying the magistrate, to whom the minister had applied, 'in refusing to issue a warrant without an oath of some person against the aggressor complained of.' The Department of State, in communicating a copy of this opinion to the minister, said: 'If, however, a diplomatic agent should be the only person who may have witnessed the acts of an aggressor in such a case, and therefore the only one capable of testifying in regard to

them, it can not be perceived why it should be considered incompatible with either his dignity, or the exemption from the jurisdiction of the country to which he is entitled, for him voluntarily to offer his testimony in the usual form.' ”

Mr. Hunter, Act. Sec. of State, to Baron Von Gerolt, Prussian min., Aug. 2, 1852, MS. Notes to German States, VI, 310. Cited from Moore, *op. cit.*, vol. IV, p. 624.

“ In the case of all offenses against the law, committed in this country, no arrest can be made, nor can any judicial proceedings be instituted, except upon complaint sustained by the oath of a credible witness. The mere allegations in notes of a diplomatic representative, although they may command the entire confidence of the executive branch of the government, are not such proof as the law requires or as the judicial tribunals of the country can recognize.”

Mr. Fish, Sec. of State, to Mr. Mantilla, Span. min., Sept. 27, MS. Notes to Spain, IX, 386. Cited from Moore, *op. cit.*, vol. IV, p. 625.

“ The Haytian minister having complained of the failure of the local authorities of the United States to institute criminal proceedings against a person who was alleged to have assaulted his son, who was stated to be an officer of his legation, he was advised that the Constitution guaranteed to every person accused of crime the right to be tried by jury, to be informed of the nature and cause of the accusation, and ‘ to be confronted with the witnesses against him,’ and that criminal proceedings could not be instituted against the person charged with assault unless upon the complaint of the person assaulted or of a witness to the assault.”

Mr. Frelinghuysen, Sec. of State, to Mr. Preston, Haytian min., July 10, 1883, MS. Notes to Hayti, I, 301. Cited from Moore, *op. cit.*, vol. IV, p. 625.

“ All the reasons, which establish the independency and inviolability of the *person* of a minister, apply likewise to secure the immunities of his *house*. It is to be defended from all outrage; it is under a peculiar protection of the laws; to invade its freedom is a crime against the state and all other nations.”

McKean, C. J., *Resp. v. De Longchamps* (Court of Oyer and Terminer, at Philadelphia, 1784), 1 Dallas, 111, 117. Cited from Moore, *op. cit.*, vol. IV, p. 627.

2. OF DOMICILE AND PROPERTY.

“ The chargé d'affaires of Russia, having a large party at his house, had a transparent painting at his window, at which a mob, which had collected, took offense; the defendant fired two pistols at the window, his intention being to destroy the painting without doing injury to the person of the minister or of any one. The defendant was indicted for an assault upon the chargé d'affaires and for infracting the laws of nations by offering violence to the

person of the minister. It was held that the law of nations identified the property of a foreign minister, attached to his person or in his use, with his person, so that an attack upon it was equivalent to an attack on the minister and his sovereign; and that it appeared to have been the intention of the act of Congress to punish offenses of this kind. But it was said that to constitute such an offense against a foreign minister the defendant must have known that the house on which the attack was made was the domicile of a minister; otherwise it was only an offense against the municipal laws of the State."

United States *v.* Hand, 2 Wash. C. C. 435. Cited from Moore, *op. cit.*, vol. IV, p. 627.

3. OF REPUTATION.

"The minister plenipotentiary of France has inclosed to me the copy of a letter of the 16th instant, which he addressed to you, stating that some libellous publications had been made against him by Mr. Jay, Chief Justice of the United States, and Mr. King, one of the Senators for the State of New York, and desiring that they might be prosecuted. This letter has been laid before the President, according to the request of the minister; and the President, never doubting your readiness on all occasions to perform the functions of your office, yet thinks it incumbent on him to recommend it specially on the present occasion, as it concerns a public character peculiarly entitled to the protection of the laws. On the other hand, as our citizens ought not to be vexed with groundless prosecutions, duty to them requires it to be added, that if you judge the prosecution in question to be of that nature, you consider this recommendation as not extending to it; its only object being to engage you to proceed in this case according to the duties of your office, the laws of the land and the privileges of the parties concerned."

Mr. Jefferson, Sec. of State, to the Attorney-General, Dec. 18, 1793, 5 MS. Dom. Let. 399. Cited from Moore, *op. cit.*, vol. IV, pp. 628-29.

"An article in Greenleaf's *New York Journal and Patriotic Register*, of Sept. 13, 1794, on 'The British Solomon,' by which title the British minister at Philadelphia, Mr. Hammond, was understood to be designated, represented him as a contemptible person, an incendiary jack-in-office, who had deceived the nation that sent him, and inspired another foreign minister with the feat of being killed by certain citizens of the United States. The article having been brought by Mr. Hammond to the notice of the Government of the United States, Mr. Randolph, who was then Secretary of State, submitted it to the Attorney General, who advised that it was *prima facie* libellous, and might, if that course was deemed prudent, be made the subject of a criminal prosecution; that the law of libel, which protected the citizen, was, in the case of a foreign minister,

‘strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from insult.’ Mr. Randolph then sent the article to the United States district attorney at New York, and said: ‘You will be pleased to proceed upon it as the law directs, and I presume that any testimony which may be necessary on the part of Mr. Hammond he will readily supply; as I shall write him to this effect.’”

Opinion of Bradford, At. Gen., Sept. 17, 1794, I Op. 52; Mr. Randolph to Mr. Harrison, Sept. 18, 1794, 7 MS. Dom. Let. 271. Cited from Moore, *op. cit.*, vol. IV, p. 629.

“The Attorney General of the United States having determined the publication in Greenleaf’s paper of the 13th instant, to which you alluded in your letter of the 13th instant, libellous, so far as it respects the minister of His Britannic Majesty near the United States, the attorney of the district of New York is instructed to proceed therein according to law. I have therefore to request you to furnish him with such proofs as may be in your power.”

Mr. Randolph, Sec. of State, to Mr. Hammond, British min., Sept. 20, 1894, 7 MS. Dom. Let. 276. Cited from Moore, *op. cit.*, vol. IV, pp. 629–630.

“An ambassador or other representative of one foreign nation residing in another is entitled to be treated with respect so long as he is permitted to continue in the country to which he is sent, and especially ought not to be libeled by any of the citizens. If he commits any offense, it belongs, in our country, to the President to take notice of it, and not to any individual citizen. The President may dismiss him or desire his recall, or complain to his sovereign and require satisfaction.”

Lee, At. Gen., 1797, I Op. 71.

“A publication charging the diplomatic representative of one country with ‘operating a spy system’ in the interest of another country, is a proper subject for consideration with a view to the institution of a criminal prosecution for libel.”

Mr. Day, Sec. of State, to the Attorney General, June 8, 1898, 229 MS. Dom. Let. 214. Cited from Moore, *op. cit.*, vol. IV, p. 630.

“In a note to Mr. Hay of June 20, 1899, Count Vinci, Italian chargé d’affaires ad interim, referred to certain testimony of Mr. Powderly, Commissioner General of Immigration, before the Industrial Commission, as having been given on the authority of ‘one Celso Cesare Moreno, who, as your excellency is aware, was prosecuted three years ago at the instance of the Federal Government and sentenced to three months’ imprisonment for defaming His Excellency Baron Fava, his Majesty’s ambassador.’”

For. Rel. 1899, 413. Cited from Moore, *op. cit.*, vol. IV, p. 630.

XXII. IMMUNITIES. (See DIPLOMATIC IMMUNITIES.)

PART TWO.

DIPLOMATIC IMMUNITIES.

I. THE FICTION OF EXTERRITORIALITY.

“Exterritoriality (or extraterritoriality) is the term used to denote the immunities accorded to foreign sovereigns, and to diplomatic agents, their families and staff, as well as to foreign residents in certain non-Christian countries in virtue of special treaty provisions. The use of the term, like that of ‘diplomacy,’ is more modern than the application of the principle. Grotius says: ‘The common rule, that he who is in a foreign territory is subject to that territory, does, by the common consent of nations, suffer an exception in the case of ambassadors; as being, by a certain fiction, in the place of those who send them (*senatus faciem secum attulerat, auctoritatem reipublicae*, ait de legato quodam M. Tullius), and by a similar fiction they are, as it were, *extra territorium*; and thus, are not bound by the Civil Law (*civili jure*) of the People among whom they live.’ In this passage *jus civile* is to be taken as meaning the territorial, or municipal, law of the state, as opposed to the law of nations, *jus gentium*. The word *extraterritorialitas* was used by Wolff in 1749, and G. F. de Martens, writing towards the end of the eighteenth century, converted it into *exterritorialité* and *Exterritorialität* in French and German respectively.

“The term is not to be strictly interpreted according to its literal meaning; it is a metaphor, not a legal fact, and it is better therefore to drop it in considering what are the immunities of the different classes of persons enumerated.”

“Thus it is sometimes pretended that the residence of a diplomatic agent is part of the territory of his own country. A public armed ship lying in a foreign port, to which it is admitted as a matter of courtesy, is held to be virtually part of the territory of the sovereign whose flag it flies. Attempts have often been made to extend this fiction to private ships, and to derive from this extension a claim to the inviolability of merchant ships on the high seas, but as they clearly are not endowed with inviolability while in a foreign port, or in territorial waters, but are subject to the local jurisdiction, the fiction can not in their case be maintained.”

Satow, *op. cit.*, pp. 240–241.

“The exterritoriality which must be granted to diplomatic envoys by the Municipal Laws of all the members of the Family of Nations

is not, as in the case of sovereign heads of states, based on the principle *par in parem non habet imperium*, but on the necessity that envoys must, for the purpose of fulfilling their duties, be independent of the jurisdiction, the control, and the like, of the receiving states. Exterritoriality, in this as in every other case, is a fiction only, for diplomatic envoys are in reality not without, but within, the territories of the receiving states. The term 'Exterritoriality' is nevertheless, valuable, because it demonstrates clearly the fact that envoys must in most points be treated as though they were not within the territory of the receiving states. And the so-called exterritoriality of envoys is actualized by a body of privileges which must be severally discussed."

Oppenheim, *op. cit.*, vol. 1, pp. 460-461.

"It is universally agreed that sovereigns and the armies of a state, when in foreign territory, and that diplomatic agents, when within the country to which they are accredited, possess immunities from local jurisdiction in respect of their persons, and in the case of sovereigns and diplomatic agents with respect to their retinue, that these immunities generally carry with them local effects within the dwelling or place occupied by the individuals enjoying them, and that public ships of the state confer some measure of immunity upon persons on board of them. The relation created by these immunities is usually indicated by the metaphorical term 'exterritoriality,' the persons and things in enjoyment of them being regarded as detached portions of the state to which they belong, moving about on the surface of foreign territory and remaining separate from it. The term is picturesque; it brings vividly before the mind one aspect, at least, of the relation in which an exempted person or thing stands to a foreign state; but it may be doubted whether its picturesqueness has not enabled it to seize too strongly upon the imagination. Exterritoriality has been transformed from a metaphor into a legal fact. Persons and things which are more or less exempted from local jurisdiction are said to be in law outside the state in which they are. In this form there is evidently a danger lest the significance of the conception should be exaggerated. If exterritoriality is taken, not merely as a rough way of describing the effect of certain immunities, but as a principle of law, it becomes, or at any rate it is ready to become, an independent source of legal rule, displacing the principle of the exclusiveness of territorial sovereignty within the range of its possible operation in all cases in which practice is unsettled or contested. This of course is conceivably its actual position. But the exclusiveness of territorial sovereignty is so important to international law and lies so near its root, that no doctrine which rests upon a mere fiction can be lightly assumed to have been accepted as controlling it.

In examining the immunities in question, therefore, it will be best to put aside for the present the idea of extritoriality, and to view them solely by the light of the reasons for which they have been conceded, and of the usage which has prevailed with respect to them.

"The immunities which have been conceded to the persons and things above mentioned are prompted by considerations partly of courtesy and partly of convenience so great as to be almost equivalent to necessity. The head of the state, its armed forces, and its diplomatic agents are regarded as embodying or representing its sovereignty, or in other words, its character of an equal and independent being. They symbolize something to which deference and respect are due, and they are constantly treated with deference and respect themselves. Supposing reasons of courtesy to be disregarded, immunities would still be required upon the ground of practical necessity. If a sovereign, while in a foreign state, were subjected to its jurisdiction, the interests of his own state might readily be jeopardized by the consequences of his position. In like manner the armed forces of a country must be at the disposal of that country alone. They must not be liable either to be so locked up as to be incapable of being used at will, or to be so affected by foreign interference as to lose their efficiency; and submission to local jurisdiction would open the door sometimes to loss of freedom, and sometimes to a supersession of the authority of the officer in command. Finally, it is for the interest of the state accrediting a diplomatic agent, and in the long run in the interest also of the State to which he is accredited, that he shall have such liberty as will enable him, at all times and in all circumstances, to conduct the business with which he is charged; and liberty to this extent is incompatible with full subjection to the jurisdiction of the country with the government of which he negotiates.

"The first of these sets of considerations was perhaps that which formerly had the greater influence. When states were identified with their sovereigns, and the relations of states were in great measure personal relations of individuals, considerations of courtesy were naturally prominent; and to them must still be referred such established immunities as are not necessary to the free exercise of the functions of the exempted person or thing. Those immunities, on the other hand, which may claim to exist on the score of necessary convenience, though in many cases they may have in fact owed their birth to courtesy, can now be more properly referred to convenience, both because it is a less artificial origin, and because it corresponds better with the present temper of states, and so with the reasons by which they would be likely to be guided in making any modifications of actual custom or in defining unsettled practice."

"For the sake of preserving harmonious relations, and in order to ensure independence or freedom in the exercise of their functions, diplomatic agents enjoy certain privileges and immunities in the countries to which they are accredited. These rights have frequently been grouped under the head of extraterritoriality. But there is a growing disposition on the part of the more recent authorities to frown upon the use of this term as a useless, misleading, if not dangerous fiction or metaphor."

"These authorities differ greatly from each other as to the nature, basis, and extent of extraterritoriality. Some consider it a mere fiction, others a legal right or principle; some make it include inviolability; others restrict it to immunity from criminal and civil jurisdiction; some extend it to the person and suite of the agent, others limit to the hotel, etc., etc.

"The main objections to this term are well summed up by Kebedgy (*Diplom. Privilegien*, 1901, p. 8). It is insufficient, since jurisdiction is not exclusively territorial; incorrect, inasmuch as the hotel or residence of the embassy is not under all circumstances exempt from local jurisdiction; unnecessary, because the immunities are explicable on other grounds. It is also dangerous, as apt to give rise to extravagant pretensions."

Hershey, *op. cit.*, pp. 284-286.

"The subject of diplomatic immunity of person and place has been obscured by the use of the phrase 'extraterritoriality.' Treating this figure of speech as a fact, and reasoning logically from it, have led to results of an unsatisfactory and impracticable character. If the hotel were, as the phrase supposes, absolutely out of the sovereign's territory, it would follow that he has no jurisdiction over an act done there, whatever its character and by whomsoever committed, unless he would have had such jurisdiction had the act been done on the soil of the ambassador's country. Thus, if a British subject committed an offense against another British subject within the limits of the hotel of the French minister, neither being connected with the embassy, and was afterwards arrested in the streets, the British court could not take cognizance of the crime, unless it could do so had it been actually committed in France. So, too, no process, civil or criminal, for any purpose, could be served within the hotel, although the person on whom it was to be served had no connection with the mission, and had only sought asylum there. Every such case would be one for international extradition.

"A clear understanding of these questions requires that the phrase should be treated as a figure of speech, and not a fact from which inferences can be drawn. The true test is one lying behind and clear of that illustration. The whole subject depends upon this principle, the convenience of nations. Nations necessarily agree that the functions of the ambassador must be performed with freedom. The ulti-

mate test is, whether the exercise of the municipal authority in question is an unreasonable interference with that freedom. The questions in detail are:—What persons and places must have immunity, and what degree of immunity, in order to the securing of this object?"

Dana's note 129 to Wheaton's *International Law* (8th ed.), pp. 303-304.

"We have now to consider the limits of national jurisdiction with reference to the persons composing legations, whether embassies or of inferior rank, and their suite, and to the houses and precincts occupied by them. A legation is not like a ship, a scene on which the quasi-territorial authority of a State is habitually exerted, so that its occasional presence within foreign geographical limits exhibits the interpenetration of two jurisdictions resting on similar principles, a *modus vivendi* between which must therefore be found. The members of a legation merely have a certain personal character which makes it necessary or convenient for the intercourse of States that they should enjoy a certain immunity from the territorial jurisdiction of the country in which their diplomatic functions require them to reside, and the suite and precincts of a legation merely enjoy certain privileges auxiliary to those of the members and to the quiet indispensable to the performance of their duties by the latter. Historically these exceptional rights can not be traced to a single source. The inviolability of ambassadors is a principle known even to savages, but it belongs to a state of war, to which without it a termination would be difficult, or to a state of such peace as may exist among savages, in which the approach of members of another tribe is not freely permitted. When so much civilization has been attained that all foreigners are inviolable except so far as they may be arrested under process of law, the inviolability of ambassadors in time of peace means no more than the special immunity from such process which is accorded to them, although it is probable that the sanctity with which the older notion fenced them may have helped to give that immunity a larger measure than for diplomatic purposes is necessary. A contributory cause has been the jealous dignity of the sovereigns of monarchical States, whose persons are deemed to be represented by ambassadors, while the latter have set the measure of the professional privileges shared by diplomats of lower rank, though only agents for business. Then came the desire to find a juridical ground for privileges already enjoyed, which led to the fiction that the precincts of a legation are part of the territory of the State which sends it, and consequently to the term 'extritoriality,' indicative of absence or exclusion from the geographical territory, being used to describe the legal position of diplomats and their precincts. The logical result of that fiction would be to give the ambassador and

the State represented by him a larger authority within the precincts than even a sovereign has ever had in the quarters occupied by him when traveling; at the same time the fiction is unnecessary for holding that a diplomat's domicile is unchanged by his mission, that conclusion following on the common principles about domicile, from the nature and precarious duration of the mission. This being now recognized, extritoriality is no longer used as a starting point for deductive reasoning by which diplomatic immunities may be measured: it is an expression which sums them up as they exist. The same expression is also often used for the legal position of foreign ships in territorial waters, but since that is not the same as the diplomatic position it seems better to reserve it for the latter, in connection with which the term was first used."

Westlake, vol. 1, pp. 273-274.

II. IMMUNITIES OF SOVEREIGNS AND PRESIDENTS OF REPUBLICS.

Unless he travels incognito, "Sovereigns and Heads of State traveling or residing abroad enjoy, in time of peace, inviolability and absolute immunity from criminal and police jurisdiction. They are also exempt from civil process except in the following cases:

"(1) In respect to any real property which they may possess as private individuals in the foreign State. (2) Respecting civil actions based upon the capacity of the State or sovereign as heir or legatee in an open succession upon foreign territory. (3) In case the State or foreign sovereign voluntarily accepts the local territorial jurisdiction. (4) For damages resulting from a delinquency committed by a sovereign upon foreign territory, unless such injuries are due to acts of sovereignty.

"Foreign sovereigns or Heads of State also enjoy certain fiscal immunities, such as freedom from direct personal taxes, customs dues, etc.; but they are not necessarily exempt from indirect taxes other than customs dues, or from taxes on realty.

"These immunities extend to his residence, family, and suite; but, contrary to the older practice, the sovereign has no criminal jurisdiction over members of his suite on foreign territory. Nor may he afford asylum to criminals or refugees from justice. Sovereigns who have abdicated or been deposed do not have a right to the privileges and immunities of reigning sovereigns, though they may enjoy them as a matter of courtesy."

Hershey, *op. cit.*, pp. 295-296.

If a sovereign travel incognito, he may at any time reveal his identity and thus claim the privileges and immunities of sovereigns.

"Another apparent exception is where a sovereign enters the military service of another sovereign. In this case his immunities are partly suspended. Where a person is subject in one country and sovereign in another, he is subject to the laws of the former in his private capacity.

"If the safety of the State requires it, as in case of conspiracy, they may be sent out of the country. This is rather an application of the supreme law of necessity than an exception to complete immunity.

"Presidents of Republics, when traveling in a representative capacity, have a right to the same privileges and immunities as Monarchical Sovereigns."

The fourth exception is somewhat doubtful. "It appears to be a principle of French jurisprudence, but it would certainly be rejected in England, where it has been held that a foreign sovereign was not liable in damages for a breach of promise of marriage which he had made while living in England under an assumed name."

See Sultan of Jabore, L. R. 1 Q. B. 149, and Moore, *op. cit.*, vol II. Hershey, *op. cit.*, pp. 295-296, notes.

"A sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He can not be proceeded against either in ordinary or extraordinary civil or criminal tribunals, he is exempted from payment of all dues and taxes, he is not subjected to police or other administrative regulations, his house can not be entered by the authorities of the State, and the members of his suite enjoy the same personal immunity as himself. If he commits acts against the safety or the good order of the community, or permits them to be done by his attendants, the State can only expel him from its territory, putting him under such restraint as is necessary for the purpose. In doing this it uses means for its protection analogous to those which one State sometimes employs against another, when it commits acts of violence for reasons of self-preservation without intending to go to war. The privileges of a sovereign consequently secure his freedom from all assertion of sovereignty over him or over anything or anybody attached to him in his sovereign capacity. On the other hand, he can not set up an active exercise of his functions as a sovereign in derogation of the exclusive territorial rights of the State in which he is. If a crime is committed by a member of his suite the accused person can not be tried and punished within the precincts occupied by him; neither he nor his judges are able to take cognizance of an action brought by a foreigner against persons in attendance on him, and if there is nothing to prevent judgment being given in questions arising between the latter alone, the decision can not at any rate be enforced. Criminals be-

longing to his suite must be sent home to be tried, and civil causes, whether between them or between subjects of other powers and them, must equally be reserved for the courts sitting within his actual territory. Again, a sovereign can not protect in his house an accused person, not a member of his suite, who takes refuge from the pursuit of the local authorities. They can not enter: but he is bound to surrender the refugee; and a refusal to give him up would justify the authorities in expelling the sovereign and in preventing the accused person by force from being carried off in his retinue.

“Where, as occasionally happens, a sovereign has a double personality, where, that is to say, he for some purposes assumes the position of a private individual, or where, while remaining sovereign in his own country, he is a subject elsewhere, he is amenable to foreign jurisdiction in so far as he is clothed with a private or subject character. Thus, if he enters the military service of a foreign country he submits to its sovereignty in his capacity of a military officer, and if he travels incognito he is treated as the private individual whom he appears to be; as however in such cases he is only accidentally or temporarily a private person, and as he properly remains the organ of his country, he has the right of taking up his public position whenever the exercise of jurisdiction over him becomes inconsistent in his view with the interests of his state. He recovers the privileges of a sovereign at will by resigning his commission or declaring his identity. Whether his power of throwing off foreign jurisdiction is equally great when he is a subject, and as such is invested with permanent privileges, which the state can not refuse to accord to him, may perhaps be open to question. If, for example, as occurred in the case of the Duke of Cumberland after his accession to the throne of Hanover, a foreign sovereign takes an oath of allegiance in England, and sits as an English peer by hereditary title, he may do acts in the exercise of his rights which lay him open to impeachment: and it would be at least anomalous and inconvenient that he should be able, whenever he may choose, to take up or lay down his privileges and responsibilities, and to protect himself at will against the consequences of the latter by putting on a mantle of inviolability.

“When a sovereign holds property in a foreign country, which clearly belongs to him as a private individual, the courts of the state may take cognizance of all questions relating to the property, and the property itself is affected by the result of the proceedings taken in them.”

Hall, *op. cit.*, pp. 179-181.

“In every monarchy the monarch appears as the representative of the sovereignty of the state, and thereby becomes a sovereign himself, a fact which is recognized by international law. And the difference

between the Municipal Laws of the different states regarding this point matters in no way. Consequently, international law recognizes all monarchs as equally sovereign, although the difference between the constitutional positions of monarchs is enormous, if looked upon in the light of the rules laid down by the Constitutional Laws of the different states. Thus, the Emperor of Russia, whose powers are very wide, and the King of England, who is sovereign in Parliament only, and whose powers are therefore very much restricted, are indifferently sovereign according to international law. . . .

"As regards, however, the consideration due to a monarch abroad from the state on whose territory he is staying in time of peace and with the consent and the knowledge of the government, details must necessarily be given. The consideration due to him consists in honors, inviolability, and extritoriality.

"In consequence of his character of Sovereign, his home state has the right to demand that certain ceremonial honors be rendered to him, the members of his family, and the members of his retinue. He must be addressed by his usual predicates. Military salutes must be paid to him, and the like.

"As his person is sacrosanct, his home state has a right to insist that he be afforded special protection as regards personal safety, the maintenance of personal dignity, and the unrestrained intercourse with his government at home. Every offense against him must be visited with specially severe penalties. On the other hand, he must be exempt from every kind of criminal jurisdiction. The wife of a Sovereign must be afforded the same protection and exemption.

"He must be granted so-called extritoriality conformably with the principle: '*Par in parem non habet imperium*,' according to which one Sovereign can not have any power over another Sovereign. He must, therefore, in every point be exempt from taxation, rating, and every fiscal regulation, and likewise from civil jurisdiction, except when he himself is the plaintiff. The house where he has taken his residence must enjoy the same extritoriality as the official residence of an ambassador; no policeman or other official must be allowed to enter it without his permission. Even if a criminal takes refuge in such residence, the police must be prevented from entering it, although, if the criminal's surrender is deliberately refused, the government may request the recalcitrant Sovereign to leave the country and then arrest the criminal. If a foreign Sovereign has real property in a country, such property is under the latter's jurisdiction. But as soon as such Sovereign takes his residence on the property it must become extritorial for the time being. Further, a Sovereign staying in a foreign country must be allowed to perform all his own governmental acts and functions, except when his country is at war with a third State and the State in which he is

staying remains neutral. And, lastly, a Sovereign must be allowed, within the same limits as at home, to exercise civil jurisdiction over the members of his retinue. In former times even criminal jurisdiction over the members of his suite was very often claimed and conceded, but this is now antiquated. The wife of a Sovereign must likewise be granted extritoriality, but not other members of a Sovereign's family.

"However, extritoriality is in the case of a foreign Sovereign, as in any other case, a fiction only, which is kept up for certain purposes within certain limits. Should a Sovereign during his stay within a foreign State abuse his privileges, such State is not obliged to bear such abuse tacitly and quietly, but can request him to leave the country. And when a foreign Sovereign commits acts of violence or such acts as endanger the internal or external safety of the State, the latter can put him under restraint to prevent further acts of the same kind, but must at the same time bring him as speedily as possible to the frontier.

"The position of individuals who accompany a monarch during his stay abroad is a matter of some dispute. Several publicists maintain that the home state can claim the privilege of extritoriality as well for members of his suite as for the sovereign himself, but others deny this. I believe that the opinion of the former is correct, since I can not see any reason why a sovereign abroad should as regards the members of his suite be in an inferior position to a diplomatic envoy.

"Hitherto only the case where a monarch is staying in a foreign country with the official knowledge of the latter's government has been discussed. Such knowledge may be held in the case of a monarch traveling *incognito*, and he enjoys then the same privileges as if traveling not *incognito*. The only difference is that many ceremonial observances, which are due to a monarch, are not rendered to him when traveling *incognito*. But the case may happen that a monarch is traveling in a foreign country *incognito* without the latter's government having the slightest knowledge thereof. Such monarch can not then of course be treated otherwise than as any other foreign individual; but he can at any time make known his real character and assume the privileges due to him. Thus the late King William of Holland, when traveling *incognito* in Switzerland in 1873, was condemned to a fine for some slight contravention, but the sentence was not carried out, as he gave up his *incognito*.

"All privileges mentioned must be granted to a monarch only as long as he is really the head of a state. As soon as he is deposed or has abdicated, he is no longer a sovereign. Therefore in 1870 and 1872 the French Courts permitted, because she was deposed, a civil

action against Queen Isabella of Spain, then living in Paris, for money due to the plaintiffs. Nothing, of course, prevents the Municipal Law of a state from granting the same privileges to a foreign deposed or abdicated monarch as to a foreign sovereign, but the Law of Nations does not exact any such courtesy.

"All privileges due to a monarch are also due to a Regent, at home or abroad, whilst he governs on behalf of an infant, or of a King who is through illness incapable of exercising his powers. And it matters not whether such regent is a member of the king's family and a prince of royal blood or not.

"When a monarch accepts any office in a foreign state, when, for instance, he serves in a foreign army, as the monarchs of the small German States have formerly frequently done, he submits to such state as far as the duties of the office are concerned, and his home state can not claim any privileges for him that otherwise would be due to him.

"When a monarch is at the same time a subject of another state, distinction must be made between his acts as a sovereign, on the one hand, and his acts as a subject, on the other. For the latter, the state whose subject he is has jurisdiction over him, but not for the former. Thus, in 1837, the Duke of Cumberland became King of Hanover, but at the same time he was by hereditary title an English Peer and therefore an English subject. And in 1844, in the case *Duke of Brunswick v. King of Hanover*, the Master of the Rolls held that the King of Hanover was liable to be sued in the Courts of England in respect of any acts done by him as an English subject."

Oppenheim, *op. cit.*, vol. 1, pp. 428-433.

"As to the position of a president when abroad, writers on the Law of Nations do not agree. Some maintain that, since a president is not a sovereign, his home state can never claim for him the same privileges as for a monarch, and especially that of extrterritoriality. Others make a distinction whether a president is staying abroad in his official capacity as head of a state or for his private purposes, and they maintain that his home state could only in the first case claim extrterritoriality for him. Others again will not admit any difference in the position of a president abroad from that of a monarch abroad. How the states themselves think as regards the question of the extrterritoriality of presidents or republics abroad can not be ascertained, since to my knowledge no case has hitherto occurred in practice from which a conclusion may be drawn. But practice seems to have settled the question of ceremonial honours due to a president officially abroad; they are such as correspond to the rank of his home state, and not such as are due to a monarch. As regards extrterritoriality, I believe that future contingencies will create the

practice on the part of the states of granting this privilege to presidents and members of their suite as in the case of monarchs. I can not see that there is any danger in such a grant. And nobody can deny that, if extritoriality is not granted, all kinds of friction and even conflicts might arise. Although not sovereigns, presidents of republics fill for the time being a sublime office, and the grant of extritoriality to them is a tribute paid to the dignity of the states they represent."

Oppenheim, *op. cit.*, vol. 1, pp. 434-435.

"The provision of section 6 of the act of March 3, 1891, which makes the decree of the circuit court of appeals final where the jurisdiction depends on 'the opposite parties' to the suit 'being aliens and citizens of the United States or citizens of different states,' does not apply to the case of a foreign sovereign who submits his case to the courts, such sovereign not being an 'alien' or 'foreign citizen' within the meaning of the statute."

Columbia v. Caucá Co. (1903), 190 U. S. 524; Moore, *op. cit.*, vol. 1, p. 559.

"The Sultan of Johore came to England *incognito*, and lived in London under the name of Albert Baker. An action was subsequently brought against him for breach of promise of marriage, the plaintiff alleging that she had known him as Albert Baker, and believed that that was his name, and that he had promised to marry her and had afterwards broken his promise. A motion was made in behalf of the defendant to stay all proceedings in the action, on the ground that he was the sovereign of an independent State in the Malay Peninsula, and that the courts therefore had no jurisdiction over him. As evidence of his sovereign character there was a letter written and signed on behalf of the secretary of state for the colonies, stating, in answer to an inquiry made by the court, that Johore was an independent State, and that the defendant was the sovereign ruler of it.' The court held that this letter, sent by the secretary of state in his official capacity, was in effect a certificate from the Queen and rendered further inquiry as to the sovereign character of the defendant unnecessary. The character of the defendant as a sovereign prince being thus established, the court held that he had not forfeited the privilege of exemption from judicial process by coming to England and living there under a false name. The judges all concurred in the view that a foreign sovereign could not be subjected to the jurisdiction of the court, unless he voluntarily submitted to it, and that he was not required to elect whether he would submit to the jurisdiction till the court sought to subject him to its process."

Mighell v. Sultan of Johore, Court of Appeal, L. R. 1894, Q. B. D., 1, 149, L. J. 1894, N. S., LXIII. 593. Cited from Moore, *op. cit.*, vol. II, pp. 558-559.

"The English authorities appear to settle these points. That the sovereign of a foreign State may sue in the tribunals of the realm, but he sues as an individual. An action can not be sustained in the name of his agent, although they may be empowered to act in the identical business. He is the party in interest. He must swear to answer a crossbill, if one is required. He would be the party to be examined personally, whenever such an examination was warranted by the rules of the court.

"Again: If a State sues, without the individuality of a monarch, some public officer representing it must be upon the record; and it seems that a minister plenipotentiary is not such an officer."

Scott, *Cases*, note, p. 172. Justice Hoffman, in the Republic of Mexico *v.* Francisco de Arrangoiz, and others, Supreme Court of the City of New York, 1855, 11 Howard's *Practice Reports*, 1, and Scott's *Cases*, 170. In this opinion Justice Hoffman gives a thorough review of all the English cases decided up to that time (1855).

On the right of a foreign sovereign to sue in courts of foreign States, see also *Prisleau v. U. S.* and Andrew Johnson, 1866, equity, 659, and Scott's 173; *U. S. v. Wagner*, Court of Appeals in Chancery, 1867, and Scott, 175; and the *Sapphire*, Supreme Ct. of U. S., 11 Wallace, 164, and Scott, 178.

On immunity of foreign sovereigns from suit, see especially *De Haber v. Queen of Portugal*, Queen's Bench, 1851, 17 Q. B., 196, and Scott, 180; *Vavasseur v. Krupp*, Chancery, 1878, 9 Chancery *Div.*, 351, and Scott, 182; *Beers v. The State of Arkansas*, U. S. Supreme Ct., 1857, 20 Howard, and the *Sultan of Johore*, L. R. 1 Q. B., 140.

"Abroad, the Sovereign *de facto* is entitled to be treated by all public functionaries of another State in all public communications with respect; and to have his proper titles assigned to him. Thus at the conferences holden in 1871 in London respecting the Treaty of Paris of March 30, 1856, the plenipotentiary of the King of Prussia claimed to be received as representative of the Emperor of Germany, a title lately conferred on the King. The claim was admitted by the plenipotentiaries of the other Powers.

"If he be personally the subject of a libel on his character or be defamed, he is entitled to the same redress in the municipal Courts of Justice in the country of the libeller as any subject of that country. If he were shut out from such redress on the ground of his being a foreigner, or upon any technical ground, he would have just ground for complaint, unless, indeed, satisfaction were extra-judicially afforded to him.

"But he has no just ground of complaint if the sentence, after a fair trial conducted according to the ordinary law of the country, be adverse to him.

"These cases are rarely such as concern the individual character of the Sovereign; they are generally such as concern the collective character of the State as represented by the Sovereign.

"The cases of persons proceeded against for libelling the Emperors Paul and Bonaparte, have been already considered as falling under the latter predicament. Plots and conspiracies against a foreign Sovereign ought to be tried and punished by the Courts of the State in amity with that Sovereign in which they are planned.

"The President of a Republic, when he represents the Republic, is entitled to the same rank and honours as a Sovereign both at home and abroad.

"The Sovereign who accepts any office, civil or military, in another State, *quoad hoc* submits himself to the authority of that State, e. g., the foreign Sovereigns who served recently in the army of the King of Prussia.

"The Sovereign who travels through, or sojourns temporarily, for whatever cause, in a foreign State, is entitled to an immunity from the *civil jurisdiction* therein. Even the private individual under these circumstances, much more the Sovereign does not become 'civis,' or even 'incola,' but remains 'advena.'

"It is not worth while to enter into the discussion whether this immunity be the result of natural law or of established custom.

"It is only in more modern times that this *exterritoriality* has become, as it may now be considered, a settled rule of international law.

"A certain amount of jurisdiction over the persons composing the suite of Sovereigns seems to be a corollary from this proposition. This jurisdiction is limited in most countries to matters of a *civil* character.

"Martens, following De Real, qualifies the generality of the proposition by these conditions:—

"1. That the Sovereign have not entered the foreign State clandestinely.

"2. That he be an actually reigning Sovereign, or recognized as such by the foreign State.

"3. That he have not submitted himself to the jurisdiction by entering into the military service of the State, or by some equivalent act of implied submission to its authority. These two last exceptions appear to be well founded; in their absence the rule 'par in parem non habet potestatem' prevails, and one Sovereign remains exempt from the civil jurisdiction of another.

"With respect to *criminal jurisdiction*, the foreign Sovereign, as a general proposition, is exempt from it. Extreme cases may be put which would make the rule inapplicable. If, indeed, he should abuse the hospitality of the kingdom, he may be ordered, like a delinquent ambassador, to depart from it without delay.

"If he should contrive or perpetrate any offence against the welfare or laws of the country in which he is a guest, international law would warrant the authorities of that country in preventing the commission

of the offence, by placing him under necessary restraint, and in subsequently demanding satisfaction for the injury at the hands of the country of this delinquent representative.

"We may go a step further and say, that his acts of violence may be met by violence, and that if he perish in consequence of the resistance opposed to his unlawful conduct no maxim of international jurisprudence is violated.

"But may the delinquent Sovereign, under any circumstances, be rendered amenable to the *criminal jurisdiction* of a foreign country? It is difficult in a treatise on law to answer a question which is founded upon the supposition that the representatives of the majesty of the law are the criminals to be tried by the law.

"If, however, the question must receive a categorical answer, the answer must be in the negative.

"The historical precedents which might appear to countenance a contrary opinion are valueless. 'Nihil igitur in hoc argumento profices rebus similiter a gentibus judicatis,' is the just observation of Bynkershoek.

"It is obvious, moreover, that this class of cases is happily so rare, and the instances cited are so exceptional in their nature, both from their own circumstances and from the periods of history in which they happened, that International Law can not rely upon them as exponents of usage in this arduous matter, but must guide the inquirer by the reason of the thing applied to the exigency of each particular occurrence.

"International Law, like the Civil Law, must pass by without attempting to bring under exact rules anomalies which a sudden emergency may create, or to provide remedies before hand for all imaginable contingencies. . . .

"The privilege of *extritoriality* is extended to the *moveable* effects which foreign Sovereigns carry with them.

"The common usage of Europe exempts such effects from the payment of custom duties and the visitation of customhouse officers. The immunity is further extended by general comity to goods destined for a foreign Sovereign or his family in their transit through foreign countries; though this privilege has sometimes, as in the Treaty of Peace between Russia and Saxony in 1745, been the subject of an express stipulation.

"As to other *private property* of a foreign Sovereign, both movable and immovable, it is, according to very high authorities on International Law, liable to arrest, adjudication, and sequestration by the municipal tribunals and to the taxes and imposts of the local government."

“Bynkershoek and Martens, who adopts his view, draw no distinction between the movable and immovable private property of the foreign Sovereign; and, as far as the reason of the thing and the sentences of the Dutch tribunals are concerned, their opinion seems well founded.

“It must be admitted, however, that the comity at least of various nations has adopted this distinction, and, moreover, that it would be placed, with the sanction of eminent jurists, among the rules of positive law.

“Not many years before Bynkershoek wrote his treatise, ‘*De Foro Legatorum*,’ the King of Prussia was cited into a Dutch Court as a defendant in the matter of the succession to the Principality of Orange.

“He appeared and contested the suit, and appealed (A. D. 1716) to the Supreme Court of the Senate, before which he seems neither to have prosecuted nor abandoned his appeal, and yet eventually to have been successful in causing the sentence of the Court below to be reversed (A. D. 1719). Probably, in this case the property was of both a movable and immovable description.

“The practice of the English Courts, both of Equity and Common Law, has been in favour of the privileged exemption of Sovereigns in all matters of private contract.

“In 1844 the Duke of Brunswick filed a bill against the King of Hanover; and the Master of the Rolls held that his Majesty was exempt from the jurisdiction of the Courts in this country for any acts done by him as King of Hanover, or in his character of sovereign prince; but that, being a subject of Her Majesty Queen Victoria, he was liable to be sued in the Courts of this country, in respect of any acts and transactions done by him, or in which he might have been engaged, *as such subject*; and that in respect of any act done by him out of this realm, or any act to which it might be doubtful whether it ought to be attributed to the character of sovereign prince or to the character of subject, the same ought to be presumed to be attributable rather to the character of sovereign prince than to the character of subject. And it was also holden by the Rolls Court, that in a suit against a sovereign prince who is also a subject, the bill ought, upon the face of it, to show that the subject-matter of it constitutes a case in which a sovereign prince is liable to be sued as a subject.

“And in a case in the English Court of Queen’s Bench, it has been held that no English Court has jurisdiction to entertain an action against a foreign Sovereign for anything done, or omitted to be done by him in his public capacity as representative of the nation of which he is the head; and therefore in an action entered in the Lord Mayor’s Court against the Queen of Portugal, ‘as reigning Sovereign’ and ‘supreme head of the nation of Portugal,’ to recover

a debt alleged to be due from the Portuguese Government, and in which a foreign attachment had issued, according to the custom of the City of London, the Court made absolute a rule for a prohibition to restrain proceedings in the action and in the attachment. And the same principle was applied where a case was entered in the Lord Mayor's Court against the Queen of Spain, not expressly as reigning Sovereign and head of the Spanish nation, but where it appeared by affidavit that the plaintiff's sole cause of action arose upon a Spanish Government bond, purporting to have been issued under a decree of the Cortes sanctioned by the Regent of Spain in the name of the Queen, then a minor.

"In *Vavasour v. Krupp* it was decided that the English Courts have no jurisdiction to prevent a foreign Sovereign from removing his *public* property in this country, although such property may be in one point of view the cause of dispute between two private suitors, and that the foreign Sovereign would not lose his rights in this respect, although in order to obtain his property he submitted to be made *ad hoc* a defendant in the suit.

Where, however, the property in dispute is a fund of money deposited in the hands of trustees or stakeholders, the English Courts are, it appears, competent to entertain any question as to the application of the fund and to award it to the person whom they deem entitled, although in so doing they may be deciding adversely to the claims of a foreign Sovereign or government which has pretensions to the fund."

Phillimore, *op. cit.*, vol. II, pp. 141-144.

"It is important, however, to remark that if a foreign Sovereign became a suitor or a plaintiff in the Courts of another country, he brings with him no privileges which can vary the practice or displace the law applying to other suitors in those Courts; and, therefore, both the Court of Chancery and the House of Lords decided that the King of Spain, though suing as a sovereign prince, and in his political capacity, in an English Court of Equity, was under an obligation to answer upon oath to a cross bill filed against him by *the defendants to his suit*; and the same doctrine had before been laid down with reference to a Republican Government, in the case of the *Colombian Government v. Rothschild*, in which the plaintiffs were described as the 'Colombian Government,' and their counsel being desired to show who they were, and not being able to do so, the demurrer to the bill was allowed, on the principle that the plaintiff must describe himself, so that the defendant might come against him by a bill or a cross bill. And in the case of *Rothschild v. Queen of Portugal*, the Court of Exchequer held that her Most Faithful Majesty, being a volutary suitor in an English Court of Law, became

subject, as to all matters connected with that suit, to the jurisdiction of the Court of Equity; and was, therefore, compellable to answer to a bill filed against her by persons who were the defendants in an action which she had brought against them, but the plaintiffs in the bill filed against her in the Court of Exchequer. Upon the same principle in *Pringle v. United States and Andrew Johnson*, V. C. Wood decided that the United States of America, suing in the Courts of this country, and thereby submitting themselves to the jurisdiction, stand in the same position as a foreign Sovereign, and can only obtain relief subject to the control of the Court in which they sue, and pursuant to its rules of practice, according to which every person sued in this Court, whether by an individual, by a foreign Sovereign, or by a corporate body, is entitled to discovery upon oath touching the matters upon which he is sued and to file a cross bill for the purpose of obtaining such discovery.

“Proceedings were accordingly stayed in a suit by the United States of America, suing in their corporate capacity, until an answer should have been put in to the cross bill of the defendant.

“And in the *United States of America v. Wagner* the Court of Appeal in Chancery held that, while a foreign sovereign state adopting the republican form of government, and recognized by the Government of her Majesty, can sue in the Courts of her Majesty in its own name so recognised, and such a State is not bound to sue in the name of any officer of the Government, or to join as co-plaintiff any such officer on whom process may be served, and who may be called upon to give discovery upon a cross bill; nevertheless the Court may stay proceedings in the original suit, until the means of discovery are secured in the cross suit.

“In the *Republic of Costa Rica v. Erlanger* a bill had been filed by the Republic of Costa Rica against Emile Erlanger and others. The defendant Erlanger filed a cross bill against the Republic and the President of the Republic, making the latter a defendant for the purposes of discovery. The Court refused to order the proceedings in the original suit to be stayed until the President had appeared, holding that the plaintiff in the cross suit was not entitled to select whomsoever he chose, but that (apparently) the Republic was bound to produce some one to give the proper discovery.

“In default of a sufficient affidavit of discovery being made, the proceedings may be dismissed.

“In the case of the *Emperor of Brazil v. Robinson and others*, the Court of Queen’s Bench decided that the Emperor, having engaged in a commercial transaction, and bringing an action thereupon in the courts of this country, and being resident out of the jurisdiction, was not exempted from that necessity of finding security for costs to which

any other person bringing such an action would be subject; and they held this decision to be consistent with the principle of a former decision in which Lord Ellenborough had decided that such a privilege of exemption did attach to an ambassador, who was in this country merely in his political capacity, and concerning whom there was no reason to suppose that he was desirous of leaving the country, or going out of the jurisdiction.

The two following cases are important. They relate to the question of the civil position as plaintiffs of an actual and of a restored legitimate government before the tribunals of a foreign state. In the case of *The Emperor of Austria v. Day and Kossuth*, Lord Campbell held that the actual reigning sovereign of a foreign State in amity with Great Britain is entitled to sue in the Court of Chancery, and to obtain an injunction to prevent the issuing of monetary notes manufactured in England, purporting to be notes of that foreign State, but having no sanction from its Government, if the Court is satisfied that some substantial injury will thereby accrue to the property of such foreign State, and to that of the plaintiff's subjects, whom he has a right to represent.

"Accordingly, monetary notes having been manufactured in this country, purporting to be sanctioned by the State of Hungary, and signed by K., a native of Hungary, resident in England, 'in the name of the nation,' but which were unauthorized by the existing Government—an injunction was granted to restrain their issue, and they were ordered to be delivered up to be canceled at the suit of the Emperor of Austria, as King *de facto* of Hungary.

"In the case of the *United States of America v. McRae*, V. C. James held that, upon the suppression of a rebellion, the restored legitimate Government is entitled, as of right, to all moneys, goods, and treasure which were public property of the Government at the time of the outbreak, such right being in no way affected by the wrongful seizure of the property by the usurping Government.

"But with respect to property which has been voluntarily contributed to, or acquired by, the insurrectionary Government in the exercise of its usurped authority, and has been impressed in its hands with the character of public property, the legitimate Government is not, on its restoration, entitled by title paramount, but as successor only (and to that extent recognizing the authority) of the displaced usurping Government; and in seeking to recover such property from an agent of the displaced Government can only do so to the same extent, and subject to the same rights and obligations, as if that Government had not been displaced and was itself proceeding against the agent.

"Therefore, a bill by the United States Government, after the suppression of the rebellion, against an agent of the late Confederate

Government for an account of his dealings in respect of the Confederate loan, which he was employed to raise in this country, was dismissed with costs, in the absence of proof that any property to which the plaintiffs were entitled in their own right, as distinguished from their right as successors of the Confederate Government, ever reached the hands of the defendant, and on the plaintiffs declining to have the account taken on the same footing as if taken between the Confederate Government and the defendant as the agent of such Government, and to pay what, on the footing of such account, might be found due from them."

Phillimore, *op. cit.*, vol. II, pp. 150-155.

III. IMMUNITIES OF DIPLOMATIC AGENTS.

"There are certain immunities or privileges extended to diplomatic representatives under international law and practice which grow out of and are a necessary part of their representative character. These immunities were much greater two and three centuries ago than they are to-day. Formerly, not only were their houses and carriages exempt from all local jurisdiction, but in many capitals an extensive quarter of the city in which their residences were located was under their control and free from even police supervision, and thus became an asylum from local justice and a refuge for criminals. They enjoyed not only all personal exemption from legal process for themselves and all residing within their quarter, but they exercised the right of judgment, and consequently of life and death over the members of their suite; they claimed to be in no way responsible for their debts, and they carried their freedom from jurisdiction and taxation to most extravagant lengths. But like the forms and ceremonies which formerly attended the ambassadorial service, these privileges have been greatly diminished, and are now exercised within reasonable limits.

"In general terms, it may be stated that diplomatic agents or representatives are subject only to the law of the state which sends them, and are free from the jurisdiction of the country to which they are accredited; and this immunity extends to all the members of the mission, the envoy's family and domestic servants. But this rule is subject to various exceptions. An envoy is free from arrest and punishment for criminal offense, but his conduct may be of such a flagrant character as to justify the offended government in disregarding this general principle on the ground of considerations of public safety. The usual course of governments, however, in cases of grave crimes or misconduct, is to ask for the recall of the envoy or to dismiss him summarily. The cases are cited of the Swedish minister in London in 1717, and of the Spanish ambassador in Paris the next

year, detected in conspiracies against the governments, who were arrested and held as prisoners and finally expelled from the respective countries. It has of late years transpired that the British and Spanish ministers in Washington were privy to the conspiracy of Aaron Burr, in 1804-1805, and gave encouragement to his projects: Had the facts been known at the time, undoubtedly they would have been dismissed from the country."

Foster, *op. cit.*, pp. 159-160.

1. IMMUNITY FROM CRIMINAL JURISDICTION.

Diplomatic agents also enjoy immunity from criminal and civil jurisdiction. Immunity from criminal jurisdiction is absolute. It consists in freedom from arrest and punishment for alleged crimes or violations of law by the local authorities, but this does not mean that public ministers are exempt from obedience to local or municipal law. In case the minister commits a serious crime or offense, he is punishable in his own country, where he is supposed to have retained his domicile, and he is responsible to his own Government, to which the proper representations should be made. A request for his recall may be made or, if his conduct be extremely reprehensible, he may be dismissed, or even, should necessity require it, be temporarily imprisoned or conducted to the frontier.

"A public minister can not be compelled to give evidence or to act as a witness in a lawsuit or criminal trial, though he may, with the consent of his Government, waive this privilege. He can not, in general, waive his privilege of immunity from criminal jurisdiction without the consent of his sovereign."

Hershey, *op. cit.*, pp. 288-289.

"A diplomatic agent can not be tried for a criminal offense by the courts of the state to which he is accredited, and can not as a rule be arrested. It is nevertheless a nice question whether he can be said to be wholly free from the local jurisdiction in respect of criminal acts done by him. If he commits a crime, whether against individuals or the state, application must ordinarily be made to the state which he represents to recall him, or if the case is serious, he may be ordered to leave the country at once, without communication being previously made to his government. But if the alleged act is one of extreme gravity, he can be arrested and kept in custody while application for redress is being made, and can even be retained for other purposes than that of restraining his freedom of action pending the result of the application. In 1717, for instance, Count Gyllenborg, the Swedish ambassador to England, was arrested for complicity in a plot against the Hanoverian dynasty, and instead of being immediately sent out of the kingdom was kept for a time, of which part

may be accounted for by the retention of the English minister in Sweden, but of which part must have elapsed before the action of the Swedish government was known. In 1718 the Prince of Cellamare, the Spanish ambassador in Paris, having organized a conspiracy against the government of the Duke of Orleans, was arrested and retained in custody until news came of the safe arrival in France of the French ambassador at Madrid. No protest was made by the resident ambassadors from other courts in the latter case, and though dissatisfaction at the arrest of Count Gyllenborg was at first felt by some of the ministers accredited to England, the expression which had been given to it was withdrawn when the facts justifying the arrest were made known. Arrests of this kind may be regarded, either, upon the analogy already applied in the case of sovereigns, as acts of violence done in self-defense against the State the representative of which is subjected to them, or as acts done in pursuance of a right of exercising jurisdiction upon sufficient emergency, which has not been abandoned in conceding immunities to diplomatic agents. The former mode of accounting for them seems forced because, though a diplomatic agent is representative of his state, he is not so identified with it that his acts are necessarily its acts; because in such cases as those cited the ambassador of a friendly power must *prima facie* be supposed to be exceeding his instructions in doing acts inimical to the government to which he is accredited; and finally because such acts as those done in the instances mentioned, in going beyond the point of an arrest followed by immediate expulsion from the country, exceed what in strict necessity is required for self-protection. It appears to be the more reasonable course therefore to adopt the latter of the two modes of explaining them."

Hall, *op. cit.*, pp. 182 and 183.

"This, also, involves two classes of cases: 1st. Where the minister is charged with crime and submits to be judged by the local tribunals; and 2nd, Where he appears in the local tribunals, charging another with crime. The two classes of cases seem, at first sight, to be very different, and yet their result may be nearly the same with respect to the *inviolability* of the minister. A distinction, however, must be drawn in the second class, between the case where the minister appears simply as an informer, to give notice of the commission of a crime by another, and where he appears as a civil party in a criminal prosecution. In the former case, his official character is not involved, for he is no party to the judicial proceedings. But if he appears as a civil party, in a criminal prosecution, he may be seriously compromised. According to French law, if the accusation be declared slanderous (*calomnieuse*), he is liable to fine and imprisonment. Such a sentence, if attempted to be carried into execution, necessarily affects the *inviolability* of his official character, in the same manner,

though in less degree, than where he himself is the original subject of the criminal proceeding. Wheaton, in speaking of the right of a minister to deliver his domestics up for a trial, under the laws of the State where he resides, says, he may do this, 'as he may renounce any of the privileges to which he is entitled by the public law.' Villefort says this statement is not only incorrect, but entirely unsupported by authorities. Perhaps he mistakes the meaning of Wheaton, by giving too literal a construction to his words. If the latter means to say that a public minister may submit himself to a criminal prosecution, which involves corporal punishment, disgrace, or infamy, and still retain his official position as the representative of a foreign State, he is evidently in error, for the two characters are utterly incompatible. How could the government, to which he is accredited, continue its official intercourse with a man which its tribunals are trying as a criminal under its laws? Again, suppose he be condemned, and the sentence be executed, will it continue to recognize him, when declared infamous, or immured in the walls of a prison? But if Mr. Wheaton means to say that a public minister may renounce his official character, and, having ceased to be the representative of his government, deliver himself up as a private individual, for trial under the laws of the State where he resides, the correctness of the statement will not be disputed.

"As ministers are exempt from the jurisdiction of the tribunals of the country where they reside, whether civil or criminal, the question has often been discussed, how are they to be punished for their offences, and how are their creditors to obtain justice? The answer is easily deducible from the principles already discussed. The minister is the officer of the State which he represents, and, by the fiction of extritoriality, he is considered to be within the limits of his own country. His State is responsible for his acts the same as if committed within its own territory. If he commit an offence upon a citizen of the State where he resides, or refuse to do justice in any of his dealings, the injured party must submit his case to his own government, which will demand satisfaction and redress from the State to which the minister belongs. For offences against the laws of the country to which he is accredited, the government of that country may not only dismiss the minister, and send him out of the country, but may demand justice and punishment of his own country, a refusal of which demand will constitute a sufficient cause for complaint, and, perhaps, for actual hostilities. History furnishes numerous cases of this kind. Thus, in 1567, Leslie, the Bishop of Ross, ambassador of Mary Queen of Scots, was banished from England for conspiring against the sovereign, while the Duke of Norfolk and other conspirators were tried and executed. It is true that the crown lawyers deemed him liable to a penal action, but the correctness of

their opinion was afterwards denied by Albericus Gentilis, Zouch, Sir Robert Cotton, Blackstone, and other eminent English authorities. Mendoza, the Spanish ambassador in England, was ordered, in 1584, to depart the realm for conspiring to introduce foreign troops and dethrone the queen, and a commissioner was sent to Spain to prefer a complaint against him. Again, in the reign of James I, the Spanish ambassadors, Inoyosa and Colonna, were complained of to the king of Spain for a scandalous libel on the Prince of Wales and Duke of Buckingham, but allowed to depart without trial. In 1654 De Bass, the French minister, was ordered to depart the country in twenty-four hours, on a charge of conspiracy against the life of Cromwell. In 1717 Gyllenburg, the Swedish ambassador in England, was arrested and his papers seized on a charge of conspiring against the king. This act was justified solely on the ground of necessity for self-defence. In 1718 the Prince of Cellarmare, Spanish ambassador in France, was arrested and his papers seized under the same charge, and he was conducted, under a military escort, to the frontier. In neither of these cases was any attempt made to try and punish the minister, nor did any of the ambassadors from other courts complain of an infringement of the privileges of their order, though a protest from this body has always been usual when an injury has been done to any member of it resident at the same court. In the case of Gyllenburg, the Spanish ambassador, Monteleone, simply observed that he was sorry some *other way* than the arrest of an ambassador and the seizure of his papers, could not have been fallen upon for preserving the peace of the kingdom. In the case of Da Sa, brother of the Portuguese ambassador in England, charged in 1653 with being accessory to a murder, he claimed the privileges of an ambassador; but, on examining his credentials, it was found that he was simply promised a commission at a future time, on the recall of his brother. He was therefore ordered to plead to the indictment. It was generally admitted that if Da Sa had actually been an ambassador he would not have been liable to trial. The laws of England did not then extend to the suite of a minister; the exemption of the minister himself from the jurisdiction of the courts of the country in case of murder; and it is very doubtful whether they would do so at the present day, especially in the case of domestic servants."

Halleck, *op. cit.*, pp. 371-375.

"As regards the exemption of diplomatic envoys from criminal jurisdiction, theory and practice of International Law agree nowadays upon the fact that the receiving States have no right, under any circumstances whatever, to prosecute and punish diplomatic envoys. But among writers on International Law the question is not settled whether the commands and injunctions of the laws of the receiving States concern diplomatic envoys at all, so that the latter have to

comply with such commands and injunctions, although the fact is established that they can never be prosecuted and punished for any breach. This question ought to be decided in the negative, for a diplomatic envoy must in no point be considered under the legal authority of the receiving State. But this does not mean that a diplomatic envoy must have a right to do what he likes. The presupposition of the privileges he enjoys is that he acts and behaves in such a manner as harmonises with the internal order of the receiving State. He is therefore expected voluntarily to comply with all such commands and injunctions of the Municipal Law as do not restrict him in the effective exercise of his functions. In case he acts and behaves otherwise, and disturbs thereby the internal order of the State, the latter will certainly request his recall or send him back at once.

“History records many cases of diplomatic envoys who have conspired against the receiving States, but have nevertheless not been prosecuted. Thus, in 1584, the Spanish Ambassador Mendoza in England, plotted to depose Queen Elizabeth; he was ordered to leave the country. In 1586 the French Ambassador in England, L'Aubespine, conspired against the life of Queen Elizabeth; *he was*, etc., simply warned not to commit a similar act again. In 1654 the French Ambassador in England, De Bass, conspired against the life of Cromwell. He was ordered to leave the country within twenty-four hours.”

Oppenheim, *op cit.*, vol. I, pp. 458-459.

“By section 4063 of the Revised Statutes of the United States any judicial process whereby ‘the person of any public minister of any foreign prince or state authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached,’ is declared to be void; and by section 4064 every person suing out or executing such process is declared to be ‘a violator of the laws of nations, and a disturber of the public repose,’ and is to be imprisoned for not more than three years and fined at the discretion of the court.”

Moore, *op. cit.*, vol. IV, p. 631.

“A diplomatic representative possesses immunity from the criminal and civil jurisdiction of the country of his sojourn, and can not be sued, arrested, or punished by the law of that country. (R. S., secs. 4063, 4064.) Neither can he waive his privilege, except by the consent of his government; for it belongs to his office, not to himself. It is not to be supposed that any representative of this country would intentionally avail himself of this right to evade just obligations.”

Instructions to Diplomatic Officers of the United States (1897), Par. 46, p. 18.

"If a minister's crimes be such as to render him amenable to local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them."

Exchange v. McFaddon, 7 Cranch, 116.

"The laws of the United States which punish those who violate the privileges of a foreign minister are equally obligatory on the State courts as upon those of the United States, and it is equally the duty of each to quash the proceedings against anyone having such privileges. In such cases the injured party may seek redress in either court against the aggressor, or he may prosecute in Federal courts under Federal statutes. (1 Stat. 117; R. S. par. 4064.) And the circuit court can not quash proceedings against a public minister pending in a State court; nor can the court in any way interfere with the jurisdiction of the courts of a State."

Ex parte Cabrera, 1 Wash. C. C. 232.

"In an instruction to a diplomatic representative of the United States, Dec. 23, 1815, Mr. Monroe, referring to the arrest of a foreign consul on a charge of rape, said: 'Even ministers of the highest grade, in cases of great enormity, are subject to the penalty of the law, according to the law of nations. Consuls can claim no exemption from it.'

"Later, Mr. Monroe modified his statement with regard to ministers, as follows: 'How far ambassadors and public ministers themselves are exempted by the law of nations from punishment for crimes of this nature, by the laws of the country in which they reside, may perhaps with some be doubtful; but this is foreign to the present purpose. Consuls, it is believed, are not exempt from such punishment.'

Cited from Moore, *op. cit.*, vol. IV, p. 632.

"If the crime committed by a public minister affects individuals only the government of the country is to demand his recall; and if his government refuses to recall him he may be expelled by force or brought to trial as no longer entitled to the immunities of a minister. If the crime affects the public safety of the country, its government may, for urgent cause, either seize and hold his person till the danger be passed or expel him from the country by force; for the safety of the State, which is superior to other considerations, is not to be periled by overstrained regard for the privilege of an ambassador.

"If the offense be grave, but not such as to compromise the public safety, the course is to demand the recall of the minister, and mean-

while to refuse or not all further intercourse with him, according to the circumstances. For implication in attempts to enlist troops in the United States it was held that the President might send his passports to the British minister, with an intimation to leave the country without delay; or, in his discretion, adopt the milder course, as President Washington did in the case of M. Genet, of affording the minister opportunity for explanation through the Secretary of State; and then, if his explanation should be unsatisfactory, to demand his recall."

Cited from Moore, *op. cit.*, vol. IV, pp. 633, 634.

"We have now to consider the very grave and difficult question, whether the inviolability of the ambassador shields him from responsibility to the *criminal law* of the state to which he is delegated—may he, with impunity, conspire against the Sovereign (*crime d'Etat*), or commit outrage on the lives and properties of the subject (*délit privé*) ?

"With respect to *criminal offences against the Private Law*, these may be of two classes: (1) against the property. (2) or the life of individuals. With respect to the former, the reason of the thing and the nature of the ambassador's function unquestionably demand his exemption from the criminal tribunals of the country.

"The Sovereign may, according to the gravity of the offence, signify, in various ways, his displeasure, or demand his recall; but he can neither be punished nor arrested.

"In 1763 the Ambassador of Holland at the Court of the Landgrave of Hesse-Cassel was accused of maladministration of a testamentary trust. The government of Cassel called upon him to render an account, which he refused to do, whereupon he was arrested with a view to obtain from him the necessary documents connected with the trust. But the Landgrave was obliged to send a special embassy to Holland, to make apology and reparation for this infraction of International Law.

"With respect to graver offences against the Criminal Law, such as murder, the question is more difficult; but the true proposition of International Law upon this subject is as laid down by Grotius, namely, that the guilty person can not be tried by the foreign tribunals. This doctrine is also supported by Wicequefort, Zouch, Bynkershoek, and Vattel.

"Great authorities in the English law, Coke, Comyns, Hale, Foster, held a contrary doctrine; but Blackstone correctly states that, whatever may have formerly been the opinion, this country follows, as others do, the opinion of Grotius.

"With respect to crimes against the majesty of the state, such as conspiracies against the government or the Sovereign thereof, it appears to be now the clear law that no judicial process in the state

against which the offence has been committed can be put in motion against the Representative of a foreign Sovereign.

“Such appears to be the best and most generally received opinion. There are not, however, wanting writers who draw a distinction between the commission of *mala prohibita* and *mala in se*, and between *privata* and *publica delicta*. But the reasons of exemption apply to both cases; namely, first, because the nature of the ambassador’s functions demands the most absolute freedom in *every case* that may arise, ‘*securitas legatorum utilitati quae ex poena est praeponderat*’; secondly, because the ambassador *represents the person of another*, and is recognized in that capacity by the tacit compact by which he is admitted into the country; it has been nobly said, ‘*Ils sont la parole du Prince qui les envoie, et cette parole doit être libre.*’

“It is not meant, however, to convey the impression either that the ambassador is to escape without punishment or that the state in which he is discharging his functions is powerless to resist his open violence, or to stay his secret machinations against her public safety, or to redress the rights of a subject whom he may have criminally injured.

“It is the duty and the right of the injured state, under these circumstances, to oppose force to force, and in the event of secret machinations, to secure the person of the ambassador and remove him from her borders, and, in the case of the *privatum delictum*, to insist upon his being tried by the tribunals, or the proper authorities, of his own country.

“One of the questions put to the civilians in the case of the ambassador to Mary Queen of Scots, which has been already referred to, was:

“‘Whether, if an ambassador be confederate, or aider, or comforter of any traitor, knowing his treason toward that Prince towards whom and in whose realm he pretendeth to be ambassador, he is not punishable by the Prince in whose realm and against whom such treason is committed or confederacy for treason conspired; and to this they answered, ‘We do think that an ambassador aiding and comforting any traitor in his treason toward the Prince with whom he pretendeth to be ambassador in his realm, knowing the same treason, is punishable by the same Prince against whom such treason is committed.’

“The opinion of the five civilians at first was considered as decisive against the bishop, but he replied with firmness that he had entered England under a safe conduct, and with the full privileges of an ambassador. Lord Burleigh said that no privilege could protect an ambassador offending against the public majesty of the Prince in whose court he was resident, and that such conduct rendered him liable to a *penal action*. But the bishop still insisted upon the privileges of an ambassador, and observed, with equal courage and

truth, that they had never been violated *viâ juris sed viâ facti*, never by regular form of trial, but by violence.

“He was detained for some in prison, and then banished from the country, but the Duke of Norfolk and other conspirators were put to death.

“This case has formed the text of all future discussions upon the subject of the inviolability of ambassadors. The opinion of Elizabeth’s civilians has been deservedly and generally rejected, by the authority of the best writers, as well as by the practice of the most civilized States.”

Phillimore, *op. cit.*, vol. II, pp. 202–205.

THE CASE OF MENDOZA, THE SPANISH AMBASSADOR.

“We now proceed to consider the leading cases in which the doctrine of ambassadorial inviolability has been brought under discussion. In the year 1584, not long after the opinions delivered in the Bishop of Ross’s case, *Mendoza*, the Spanish Ambassador in England, having conspired to introduce foreign troops and dethrone the Queen, it was a matter of difficulty how he should be punished. The government, however, took the opinions of the celebrated *Abercius Gentilis*, then in England, and of *Hottoman* in France, who both asserted that an ambassador, *though a conspirator*, could not be put to death, but should be referred to his principal for punishment; or (according to *Hottoman*) sent away by force out of the country. In consequence of this, *Mendoza* was simply ordered to depart the realm, and a commissioner sent to Spain to prefer a complaint against him.”

Phillimore, *op. cit.*, vol. II, p. 206.

2. IMMUNITY FROM CIVIL JURISDICTION.

“The second privilege of envoys in reference to their extritoriality is their exemption from criminal and civil jurisdiction. As their exemption from criminal jurisdiction is also a consequence of their inviolability, it has already been discussed, and we have here to deal with their exemption from civil jurisdiction only. No civil action of any kind as regards debts and the like can be brought against them in the Civil Courts of the receiving States. They can not be arrested for debts, nor can their furniture, their carriages, their horses, and the like, be seized for debts. They can not be prevented from leaving the country for not having paid their debts, nor can their passports be refused to them on the same account. Thus, when in 1772 the French Government refused the passports to Baron de Wrech, the envoy of the Landgrave of Hesse-Cassel at Paris, for not having paid his debts, all the other envoys in Paris

complained of this act of the French Government as a violation of International Law. But the rule that an envoy is exempt from civil jurisdiction has certain exceptions. If an envoy enters an appearance to an action against himself, or if he himself brings an action under the jurisdiction of the receiving State, the courts of the latter have civil jurisdiction in such cases over him. And the same is valid as regards real property held within the boundaries of the receiving State by an envoy, not in his official character, but as a private individual, and as regards mercantile ventures in which he might engage on the territory of the receiving State."

Oppenheim, *op. cit.*, vol. I, pp. 464-465.

"As to the civil jurisdiction of the country to which a mission is accredited, the facts that its members do not acquire a domicile in it by their diplomatic residence and that they very seldom belong to its nationality prevent a large part of the possible causes of suit against them from falling within that jurisdiction. The Institute of International Law has expressed the opinion that where they do possess that nationality they ought not to be able to claim immunity from suit, but it has been held in England that a British subject received as a member of a foreign mission will have the privileges of extritoriality so far as the government has not expressly excluded them in its reception of him. Where a suit would be entertainable against an ordinary person, notwithstanding his foreign domicile and nationality, distinctions may be drawn.

"It is generally admitted that a diplomatic person is exempt from the territorial jurisdiction on engagements contracted by him either in his official capacity or in a purely private as distinguished from a mercantile or professional capacity, and that so much of his property, movable or immovable, as is necessary to his dignity and comfort can not be seized for any debt. But opinions and the practice of courts differ as to points beyond these; and since in such circumstances no international agreement can be asserted, the question is one for national law, on which we can not here enter into details. It is enough to say that in England the widest views as to diplomatic immunity are adopted. The st. 7 Anne, c. 12, which is the most formal document we have on the subject, declares the goods of an ambassador or other public minister without limitation to be incapable of distraint or seizure and makes no exception on the ground of trade to his immunity from suit, but only excludes from the benefit of the act any person 'within the description of any of the statutes against bankrupts who shall put himself into the service of any such ambassador or public minister.' And though in one case it seems to have been thought, somewhat doubtingly, that a foreign minister who engages in commercial transactions may be

made a nominal defendant to a suit 'merely for the purpose of ascertaining the liability of the other defendants,' no attempt being made to enforce against him any judgment which may be obtained, a later case decides against that view. Again, although Wheaton says that 'the hotel in which [a foreign minister] resides, though exempt from the quartering of troops, is subject to taxation in common with the other real property of the country, whether it belongs to him or to his government,' yet it has been held in England that the payment of local rates can not be enforced by suit or distress against a member of a mission, and the same would no doubt be held in the case of national taxes."

Westlake, *op. cit.*, pp. 277-278.

"Voluntary submission to local civil jurisdiction presents two classes of cases: 1st, Where the minister voluntarily appears as a defendant in a civil action and admits jurisdiction; and, 2nd, Where he appears as plaintiff and avails himself of the local jurisdiction against another as defendant.

"The former class of cases seems, at first sight, to present more difficulties, with respect to *extent* of jurisdiction, than the latter; for, if judgment be given against the minister as defendant, the execution or other process for its satisfaction issued against his property or person might seriously infringe upon his diplomatic privilege of *inviolability*. But, in fact, the same result might follow in a case where he is plaintiff; for, if he fail in his suit, judgment might be decreed against him for costs. Moreover, the defendant may present and establish counter-claims to a larger amount than his demand, and thus obtain judgment for the difference. And again, the opposing party may appeal to a higher tribunal, and thus carry the minister, against his consent, to a higher court. Does the minister, by voluntarily submitting to, or claiming the local jurisdiction, become liable to all the consequences the same as an ordinary litigant? It would certainly be very absurd to allow him to claim it in any particular case, and then to withdraw himself from it whenever such a course suited his interest or convenience. And yet to execute, against him as against an ordinary litigant, the judgment of the court, would seriously compromise the *inviolability* of his diplomatic character. In order to obviate this difficulty, some make a distinction between the judicial proceedings of the court before final judgment and the supplementary proceedings for the execution of that judgment. 'This last theory,' says Villefort, 'although vague and somewhat arbitrary, is, perhaps, the best in a matter where it may be said more reasonably than in any other that there is no absolute rule. It, moreover, has the advantage of conforming to the principles laid down by the ancient publicists who founded the science.' According to

this view, no proceedings by way of execution of judgment can be taken against the person of the minister, or against any of his property which, by the rules of international jurisprudence, is entitled to the privilege of exemption; in other words, although a minister may renounce his right of *extra-territoriality*, he can not divest himself of the *inviolability* which the law of nations attaches to his person and office.

“The following consequences seem to result from this discussion: 1st, If a minister renounces his privilege of exemption, and submits to local jurisdiction by appearing in a civil action, either as plaintiff or defendant, and judgment be rendered against him, he is bound to pay it; 2nd, If the judgment be in his favor, and the other party appeal to a higher tribunal, he must submit to the jurisdiction of appeal; 3rd, A final judgment against a minister can only be satisfied out of property which he possesses separate and distinct from his diplomatic character, and no proceedings can be taken against his person, or against property privileged by the law of nations. In 1720, the Envoy Extraordinary of the Duke of Holstein was sued in Holland for debt, contracted by him in course of trade. A decree of arrest and citation was granted against him; all his goods, money and effects within the jurisdiction of the court were subjected to the decree, but his movables and things belonging to him as ambassador were exempt.

“But does an ambassador who, while accredited to a foreign Court, engages in trade, forfeit his privilege as ambassador? The answer is this: Such a person does not forfeit his privileges by engaging in mercantile transactions; although his servants do in England, by virtue of the exception in the statute of Queen Anne. In the case of *Taylor v. Best and others*, decided in 1854, the Lord Chief Justice Jervis said, ‘If an ambassador or public minister during his residence in England violates the character in which he is accredited to that Court by engaging in commercial transactions that may raise a question between the Government of Great Britain and that of the country by which he is sent, he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character—the proviso in the statute of Anne limiting the privilege in cases of trading, applying only to the servants of the embassy. For this, *Barbuit’s* case is an authority.’ And Mr. Justice Maule added: ‘There is a manifest distinction between the case of an ambassador and that of a domestic servant of an ambassador. The privilege is not that of the servants but of the ambassador. It is based on the assumption that, by the arrest of any of his household retinue, the personal comfort and state of the ambassador might be affected. Where these are not interfered with, the ambassador is not affected by the suit, and consequently the servant has no privilege.

These cases do not in any degree determine the point which has been attempted to be raised on the present occasion—and undoubtedly it is a point which is very fit to be considered wherever it may be properly presented for decision—viz., whether an ambassador or public minister can be brought into court against his will by process not immediately affecting either his person or his property, and have his rights and liabilities ascertained and determined. Unquestionably it must to a certain extent interfere with the ambassador's comfort to have his rights in any way made the subject of litigation, and therefore it may as well be that the privilege he enjoys is as large and extensive as Mr. Justice Blackburn affirms it to be. But it is unnecessary to determine that question upon the present occasion.'

"In the case of the *Magdalena Steam Navigation Company v. Martin*, decided in 1859, Lord Campbell delivered judgment: 'The question raised by this record is whether the public minister of a foreign State accredited to and received by her Majesty, having no real property in England, and having done nothing to disentitle him to the privileges generally belonging to such public minister, may be sued against his will in the courts of this country for a debt, neither his person nor his goods being touched by the suit, while he remains such public minister. He says by his plea to the jurisdiction of the court that, by reason of his privilege as such public minister, he ought not to be compelled to answer. We are of opinion that his plea is good, and that we are bound to give judgment in his favor. The great principle is to be found in Grotius, "*De Jure Belli et Pacis*," lib. 2, c. xviii. s. 9, "*Omnis coactio abesse a legato debet.*" He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the sovereign to whom he is accredited, and he has at least as great privileges from suits as the sovereign whom he represents. He is not supposed even to live within the territory of the sovereign to whom he is accredited, and if he has done nothing to forfeit or waive his privilege, he is for all judicial purposes supposed to be still in his own country. For these reasons the rule laid down by all jurists of authority, who have written upon the subject, is that an ambassador is exempt from the jurisdiction of the courts of the country in which he resides as an ambassador. Whatever exceptions there may be, they acknowledge and prove this rule. * * *. Lord Coxe's authority, 4 "*Inst.*" 153, was cited, where, writing of the privileges of an ambassador, having said that "for any crime committed *contra jus gentium*, as treason, felony, adultery, or any other crime which is against the law of nations, he loseth the privilege and dignity of an ambassador as unworthy of so high a place," he adds, "and so of contracts that be good *jure gentium* he must answer here." There does not seem to be anything in the contract set out in this

declaration contrary to the law of nations; but Lord Coke, who is so great an authority as to our municipal law, is entitled to little respect as a general jurist. For the plaintiffs, it was strenuously maintained that at all events the action could be prosecuted to that stage (to judgment), with a view to ascertain the amount of the debt, and enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas in *Taylor v. Best*, it is supported by no authority: the proceedings would be wholly anomalous; it violates the principle laid down by Grotius: it would produce the most serious inconvenience to the party sued, and it could hardly be of any benefit to the plaintiffs. In the first place, there is a great difficulty in seeing how the writ can properly be served; for the ambassador's house is sacred, and is considered part of the territory of the sovereign he represents; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his sovereign with one of her ministers. * * * It certainly has not hitherto been expressly decided that a public minister, duly accredited to the Queen by a foreign State, is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles, and we give judgment for the defendant."

Halleck, *op. cit.*, pp. 367-371.

"The immunities from civil jurisdiction possessed by a diplomatic agent, though up to a certain point they are open to no question, are not altogether ascertained with thorough clearness. The local jurisdiction can not be exercised in such manner as to interfere however remotely with the freedom of diplomatic action, or with the property belonging to a diplomatic agent as representative of his sovereign. A diplomatic agent can not, therefore, be arrested, and the contents of his house, his carriages, and like property necessary to his official position, can not be seized. For some purposes also he is distinctly conceived of as being not so much privileged as outside the jurisdiction. Thus children born to him within the State to which he is accredited are not its subjects, notwithstanding that all persons born of foreigners within its territories may be declared by its laws to be so. On the other hand, the jurisdiction of the State extends over real property held by him as a private individual, and he is subject to such administrative and police regulations as are necessary for the health or the safety of the community.

"Beyond these limits there is considerable difference of opinion. Some writers consider that, except for the purposes of the regulations mentioned and in respect of his real property, his consent is

required for the exercise of all local jurisdiction, and that consequently it can only assert itself in so far as he is willing to conform to its rules in noncontentious matters, or when he has chosen to plead to an action, or to bring one himself. In cases of the latter kind he consents to the effects of an action in so far as they do not interfere with his personal liberty or with the property exempted in virtue of his office; he makes his property liable, for example, to payment of costs and damages, and when he himself takes proceedings he obliges himself to plead to a cross-action. In other matters, according to this view, he is subject to the laws of his own State, and satisfaction of claims upon him, of whatever kind they may be, can only be obtained, either by application to his sovereign through the Government to which he is accredited, or by having recourse to the courts of his country. Other authorities hold that in matters unconnected with his official position he is liable to suits of every kind brought in the courts of the country where he is resident; that the effects of such suits are only limited by the undisputed immunities above mentioned, and that consequently all property within the jurisdiction, other than that necessary to his official position, is subjected to the operation of the local laws. Thus he is exposed, for example, to actions for damages or breach of contract; if he engages in mercantile ventures, whether as a partner in a firm or as a shareholder in a company, his property is liable to seizure and condemnation at the suit of his creditors; if he acts as executor he must plead to suits brought against him in that capacity.

“Of these two opinions the former is that which is the more in agreement with practice. In England it is declared by statute that ‘all writs and processes whereby the goods or chattels’ of a diplomatic agent ‘may be distrained, seized or attached shall be deemed and adjusted to be utterly null and void to all intents, constructions and purposes whatsoever.’ The law of the United States is similar. In France, during the eighteenth century, it was held that the only object of the immunity of an ambassador was to prevent him from being embarrassed in the exercise of his functions, and that, as his property can be seized or otherwise dealt with without preventing him from fulfilling his public duties, whatever he possesses in the country to which he is accredited is subjected to the local jurisdiction. From a wish, however, to avoid as much as possible any act derogating from the courtesy due to the ambassador as representative of his state, it was considered best to exert the territorial jurisdiction by means less openly offensive than that of allowing suits against him to be thrown into the courts. Accordingly when Baron von Wrech, minister of Hesse-Cassel, endeavoured to leave France without paying his debts, his passport was refused until his creditors were satisfied. In the nineteenth century a change of view appears

to have taken place, and the exemption of a diplomatic agent from the control of the ordinary tribunals is treated rather as a matter of right than of courtesy. An article expressly conceding immunity was inserted in the original project of the civil code, and though it was expunged on the ground that it had no place in a code of municipal law, the courts have always treated it as giving expression to international law, and have acted in conformity with it. In Austria the civil code merely declares that diplomatic agents enjoy the immunities established by international law. In Germany the code in like manner provides that an ambassador or resident of a foreign power shall retain his immunities in conformity with international law; and the space which they are understood to cover may perhaps be inferred from the language used in 1884 by Baron von Bülow, who in writing to Mr. Wheaton with reference to a question then at issue between the governments of Prussia and the United States, said that 'the state cannot exercise against a diplomatic agent any act of jurisdiction whatever, and as a natural consequence of this principle the tribunals of the country have, in general, no right to take cognizance of controversies in which foreign ministers are concerned.' But for the use of the words 'in general' this statement of the views then entertained by the Prussian Government would be perfectly clear, and considering the breadth with which the incapacity of a state to exercise jurisdiction is laid down, it seems reasonable to look upon them only as intended to except cases in which a diplomatic agent voluntarily appeals to the courts. In Spain the curious regulation exists that an ambassador is exempt from being sued in respect of debts contracted before the commencement of his mission, but that he is liable in respect of those incurred during its continuance. In Portugal the same distinction is made, but in a converse sense, an ambassador being exposed to proceedings in the courts in respect of such debts only as he has incurred antecedently to his mission. In Russia the ministry of foreign affairs is the sole medium for reclamations against a diplomatic agent.

"Custom is thus apparently nearly all one way; but the accepted practice is an arbitrary one, conceding immunities which are not necessary to the due fulfilment of the duties of a diplomatic agent; and in a few countries it is either not fully complied with or there may at least be some little doubt whether it would certainly be followed in all cases or not. The views expressed by so competent an authority as M. Bluntschli suggest that courts, at least in Germany, might take cognizance of a considerable number of cases affecting a diplomatic agent by looking upon his private personality as separable from his diplomatic character."

Hall, *op. cit.*, pp. 183-188.

"All writers agree that the official property of the embassy is exempt; as the hotel, with its furniture and appurtenances; the personal effects of the ambassador; and everything which can be said to be a means or instrumentality for exercising the diplomatic functions. The only question is as to real or personal property of the ambassador, being neither official property, personal effects, nor official instruments or means. The same objection exists to allowing process *in rem* against such property, as to requiring his appearing in court as a party or witness. If his property is proceeded against, he must become a litigant to defend or regain it, and be subjected to rules controlling his time and movements, even if he secures exemption from other obligations and liabilities of common suitors. The decision of this question ought not to depend, as most writers seem to make it, on the character of the property seized as official or unofficial: for the seizure is but a step in the litigation. The owner is to have notice to appear and litigate, and must either lose his property or become a party to the litigation. The balance of convenience is in favor of the exemption from seizure of all the property of an officer whom it is right to exempt from being compelled to appear as a defendant in a strictly personal suit. He is liable in his own country; and the remedy by diplomatic complaint will usually be sufficient.

"As to cases of property engaged in trade, or held in private trust, one rule of conduct ought to be laid down. The diplomatic officer should not engage either in trade, or in the execution of unofficial trusts which may involve litigation. If his so doing is regarded by international law as a waiver to his privilege, it may be in derogation of the rights of his own sovereign, whose privilege it is that he undertakes to waive. If it is not so regarded, it may operate unfairly upon other parties."

Dana's note to Wheaton, p. 307.

"We have now to consider the exemption of the ambassador from the jurisdiction of the *civil tribunals* of the country to which he is accredited. With respect to this subject the privileges of Exterritoriality have been established by the universal consent and custom of all civilized nations, in order to secure the sanctity of the ambassador: they have been thrown up from time to time, as outworks to the citadel.

"The presumption of law, both from the length of the usage and the reason of the thing (*testatu et proesumptamens gentium*), is so strong that, unless due notification of the intention to depart from the established custom had been given, the ambassador would unquestionably be entitled to demand the enjoyment of the exterritorial privileges ordinarily incident to his station.

“If, in an evil hour, for its own welfare, such due notification had been given by any state, and nevertheless an ambassador, which is a most improbable hypothesis, had been accredited to it, he would not be entitled to claim, as matters *stricti juris*, those privileges the denial of which had formed the subject of the notification.

“This proposition, however, must be qualified by two important reservations:—

“1. It is not competent to a state, by any notification, under the pretext of curtailing extritorial privileges, to deprive an ambassador of those privileges, which are essential to secure performance of his functions, such, for instance, as appertains to the inviolability of his person.

“2. A state so narrow-minded and ill-advised as to refuse the customary extritorial privileges to the representative of another state, must take care to act in this matter impartially towards all nations. The nation unfavourably distinguished from others by conduct involving a departure from long usage of the civilised world, would be entitled to consider such unfavourable distinction as a just cause of war. * * *

“Nevertheless, the exemption of the ambassador, his family, and his suite from the jurisdiction of the civil as well as the criminal tribunals of the country in which he was resident, is not absolutely necessary for the preservation of the inviolability of the ambassador. ‘*Persona*,’ Bynkershoek truly remarks, ‘*quantumvis sancta, sola in jure vocatione non violatur*.’ * * *

“It was a further extension of the fiction of Exterritoriality to render the ambassador’s personal property exempt from arrest; this was little more than an application to ambassadors of the rule generally adopted by nations with respect to private foreigners, that their personal effects were considered, as much as their persons, to belong to their domicile.

“It has not yet been, and probably never will be, extended to real property, if an ambassador should happen to possess any in the country of his mission. The territorial possession is in no way attached to the character of the ambassador. The fiction of Exterritoriality can not be applied to immovable possessions, and there is no doubt that they, with their incidents, remain subject to the jurisdiction (*forum reale*) of the country in which they are situate. The only question, in such a case, would be the proper way of serving the ambassador with notice of such an action. It has been said that, technically speaking, notice ought to be served upon his domicile, *i. e.*, his residence in his own country; but Bynkershoek justly observes that a letter is at once the most courteous and most effectual way of apprising him of his interest in the legal proceedings.

“From this rule with regard to *real* property is to be exempted the actual dwelling house of the ambassador, which is intimately connected with his personal inviolability.”

Phillimore, *op. cit.*, vol. II, pp. 219-222.

THE CASE OF THE AMBASSADOR OF PETER THE GREAT.

“In 1708, in the reign of Queen Anne, an ambassador from Peter the Great, Czar of Muscovy, was arrested and taken out of his coach in London for a debt of fifty pounds which he had there contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the Queen. The persons who were concerned in the arrest were examined before the Privy Council (of which the Lord Chief Justice Holt was at the same time sworn a member), and seventeen were committed to prison, most of whom were prosecuted by information in the Court of Queen’s Bench at the suit of the Attorney General, and at their trial before the Lord Chief Justice were convicted of the facts by the jury, reserving the question of law, how far those facts were criminal, to be afterwards argued before the judges, which question was never determined. In the meantime the Czar resented this affront very highly and demanded that the Sheriff of Middlesex and all others concerned in the arrest should be punished with instant death. But the Queen, to the amazement of that despotic court, directed her secretary to inform him that she could inflict no punishment upon even the meanest of her subjects unless warranted by the law of the land, and therefore was persuaded that he would not insist upon impossibilities. To satisfy, however, the clamours of the foreign ministers (who made it a common clause), as well as to appease the wrath of Peter, a bill was brought into Parliament and afterwards passed into a law to prevent and punish such outrageous insolence for the future. And with a copy of this Act, elegantly engrossed and illuminated, accompanied by a letter from the Queen, an ambassador extraordinary was commissioned to appear at Moscow, who declared that though her Majesty could not inflict such a punishment as was required, because of the defect in that particular of the former established constitutions of her kingdom, yet with the unanimous consent of the Parliament she had caused a new Act to be passed to serve as a law for the future. This humiliating step was accepted as a full satisfaction by the Czar; and the offenders at his request were discharged from all further prosecution.”

Halleck, *op. cit.*, pp. 361-362. For a fuller report of this case, see Stowell and Munro, *Int. Cases*, vol. I, pp. 3-7. For another famous case—that of Baron de Wrech (1772)—see Satow, vol. I, pp. 255-258.

THE CASE OF BARON DE WRECH.

“The immunities of diplomatic representatives are based on the principle that nothing should be done to disturb them in the exercise of their official functions, and there are limits to the immunity known as exemption from civil jurisdiction, *e. g.* in respect of immovable property owned by a minister in the country to which he is accredited, or of a contract entered into before a notary public. A minister can not take advantage of his privilege in order to avoid paying debts contracted by him in the country where he resides, because such evasion would be contrary to the intentions of his sovereign, while it could not be intended by the sovereign to whom he is accredited that his subjects should be subjected to loss in consequence of the public character of the diplomat. The privilege of diplomatists only concerns what they possess in their official character, and without which they could not exercise their functions. It is a rule admitted by all the courts that a diplomatic representative ought not to leave the country without satisfying his creditors. The only question, therefore, that arises is: When a minister neglects the performance of this duty, what is to be done?

“At Vienna, the marshalate of the empire claims jurisdiction over everything not connected with the person of the ambassador and his functions, to an extent sometimes regarded as difficult to reconcile with the generally received maxims. This court watches over the payment of debts contracted by ambassadors, especially at the moment of their departure. Of this an example was seen in 1764, when the effects of Count Czernicheff, Russian ambassador, were detained until Prince Liechtenstein became surety for him.

“In Russia, a diplomatic representative has to publish three notices of his intended departure. The children, papers, and effects of M. Bausset, French ambassador, were detained until the King undertook to see to the payment of the ambassador's debts.

“At the Hague, the Council of Holland claims jurisdiction in those states where the interests of subjects are prejudiced. In 1688 a writ was served on a Spanish ambassador in person, who complained; the States decided that the complaint was well founded in so far that the writ ought to have been served on one of his suite.

“At Berlin, in 1723, the Baron de Posse, minister of Sweden, was arrested and kept in custody because he refused to pay a saddler's bill, in spite of repeated warnings from the magistrate.

“At Turin, an ambassador's coach was stopped in the reign of Emmanuel. The Court of Turin cleared itself of this act of violence, but no one objected to the proceedings which had been taken to condemn the ambassador to pay his debts.

“Grotius, Bk. II, cap. xviii, par. ix, in Barbeyrac’s version, is quoted to the effect that ‘if an ambassador has contracted debts and has no immovable property in the country, he must be told politely to pay; if he refused, he who sent him would be applied to, after which recourse would be had to the proceedings taken against debtors who are out of the jurisdiction.’

“The most moderate opinion is that it is proper in all cases to abstain, as far as possible, from infringing on the decency which ought to surround his public character; but the sovereign is entitled to employ that kind of compulsion which causes no disturbance in his functions, and consists in prohibiting the ambassador from quitting the country until he has satisfied his engagements. It is in this sense that Bynkershoek advises the employment against ambassadors of proceedings which imply rather a prohibition than an order to do such or such a thing. It is then a simple prohibition, and no one would venture to maintain that it is unlawful to defend oneself against an ambassador, who ought not to disturb the inhabitants by using violence and carrying off what belongs to another. This maxim is all the more appropriate, when particular and aggravated circumstances charge the minister with bad faith and reprehensible proceedings. When he thus violates the sacredness of his character and public security, he can not demand that others respect him. It is sufficient to recall the conduct of the Baron de Wrech since his arrival at Paris and, above all during the last eight months. The indecent methods he had adopted to procure money having been stopped, he gave himself up to all sorts of proceedings, which consideration for his position prevents me from characterizing. It is enough to remark that everything conduces to the belief that he had formed the design of disappointing his creditors by quitting the kingdom, and this circumstance is sufficient to authorize taking against him the same measures that would be taken if he had in effect left the kingdom after having laid aside his character by presenting his letters of recall. The minister for Foreign Affairs caused him to be exhorted by the magistrate charged with the police and himself exhorted him to do honour to his obligations. It was in consequence of these considerations that, on the repeated complaints of the creditors of the Baron de Wrech, the minister for Foreign Affairs thought fit to suspend the preparation of the passport he had asked for in order to leave the kingdom until the intentions of his master the Landgrave could be ascertained through the minister who resides on the part of the King at his Court. In order to reconcile the protection which the King owes to his subjects with the consideration due to a diplomatic position (*caractère public*), and in order to discharge all the processes which the rules of the Law of Nations may dictate, the ministry for Foreign Affairs has informed

the Landgrave of the conduct of his minister. That sovereign will have the less ground for objecting to the course pursued toward his minister in that he caused to be imprisoned, four or five years ago, the Count de Wartensleben, Dutch minister, in order to compel him to give account of a trust of which he was the executor. It is true that the action taken against the person of the minister was condemned, but the States-General did not contest the jurisdiction of the Landgrave, and in the case of the Baron de Wrech the principles which that sovereign (*prince*) has maintained will not allow him to shield his minister from the measures calculated to ensure the rights of the King's subjects nor to deprive them of the only pledge they have of the execution of their agreements with him."

Satow, *op. cit.*, vol. 1, pp. 256-258. Mem. of the French Ministry in the case of Baron de Wrech (1772).

THE WHEATON CASE.

"Mr. Wheaton in his treatise on international law has discussed at length the question how far the personal effects of a diplomatic officer are liable to be seized or detained, in order to enforce the performance, on his part, of the lease of a dwelling house. In this case the landlord brought in a claim for damage to the premises occupied by Mr. Wheaton while American minister in Berlin. He contested the right of the authorities to detain his personal effects to respond for the claim. They were finally restored to him on payment of a reasonable compensation for the injury done to the premises, but both he and his Government denied that the proceeding was well founded in international law. The minister regarded it as important to contest the case for the sake of the principle involved, and he was doubtless technically correct, but his conduct was severely censured by European writers, who pointed out the case of the minister of Hesse Cassel at Paris in the past century, who was refused his passports and not permitted to leave France till his debts were secured."

Foster, *op. cit.*, p. 170.

"While Mr. Wheaton was minister to Prussia the owner of the house in which he lived claimed the right to detain his goods found on the premises at the expiration of his lease, in order to secure the payment of damages alleged to be due on account of injuries done to the house during the contract. The landlord claimed this right under the Prussian civil code, which gave the lessor, as a security for the rent and other demands arising under the contract, the right of a *pfandgläubiger* upon the goods brought by the tenant upon the premises and there remaining at the expiration of the lease. By the same code 'a real right, as to a thing belonging to another, assigned to any person as security for a debt, and in virtue of which he may

demand to be satisfied out of the substance of the thing itself, is called *Unterpfandsrecht*.'

"The Prussian Government decided that the general exemption of the personal property of a foreign minister from the local jurisdiction did not extend to the case in question, where, it was contended, the right of detention was created by the contract itself and by the legal effect given to it by the local law. This position was combatted by Mr. Wheaton, on the ground that it placed members of the diplomatic corps on the same footing with the subjects of the country, as to the right which the Prussian code conferred on the lessor of distraining the goods of a tenant to enforce the performance of a contract, and that it violated the immunities to which diplomatic officers were entitled. The Prussian Government replied that no Prussian authority had pretended to exercise a right of jurisdiction over the property of the minister; that the question at issue was that of the legal rights established by the contract of hiring between the landlord and the tenant, and that to determine this question there could be no other rule than that of the civil law of the country where the contract was made.

"The controversy was ended as between the parties by the landlord restoring the minister's effects on payment of a reasonable compensation for the injury done to the premises. The Prussian Government, however, proposed to submit to the Government of the United States the question whether, if a foreign minister in the United States should enter into a contract with an American citizen under which, by the laws of the land, such citizen acquired a *real right* (*droit réel*) over personal property (*biens mobiliers*) belonging to the minister, the American Government would undertake to deprive such citizen of his 'real right' at the instance of the minister. The Government of the United States answered that if there was only an implied contract, growing out of the relation of landlord and tenant, by which, under a municipal law, a tacit lien upon the furniture was given, and no express hypothecation, still less any giving in pledge, which implied a transfer of possession by way of security for a debt, the view taken by Mr. Wheaton was deemed correct, and was in accordance with the rule laid down in the act of Congress of 1790. The Prussian Government rejoined that its opinion upon the point in controversy remained unchanged by the authorities that had been cited; that the question was not one of the exercise of jurisdiction over a diplomatic representative, but whether a lessor, by exerting his right of retention, had committed a breach of the minister's privileges for which he might be brought before the competent judge and compelled to restore the effects retained by him."

Moore, *op. cit.*, vol. IV, pp. 646-648. For a fuller report of this case, see Wheaton's *Elements of Int. Law*, Dana's ed., secs. 228-241, pp. 307-319.

“If Mr. Wheaton had pledged the articles to the landlord by a contract, he might be considered as having waived his official privilege in respect to them. But if the landlord had only a lien by force of general law and that lien was only a right, to enforce which he was obliged to invoke the aid of a court and use its process, the question was not an abstract one of civil law on the existence of the lien, but a question of public law, whether compulsory process shall be permitted by a State against property *in that predicament*, whatever be the nature of the claim.”

Dana's Note to Wheaton, sec. 242, p. 319.

OTHER CASES.

“August 5, 1878, Mr. Barrett, a justice of the peace of Saratoga County, N. Y., issued a summons in debt at the suit of one Sailor, a livery stable keeper, for a small amount, against the Marquis Mantilla, the Spanish minister in the United States, requiring the latter to appear on the 7th of the same month to answer. The minister at once admitted the service and returned the summons to the justice with a communication calling his attention to sections 687, 688, 4063, and 4064, R. S., which the minister transcribed. On the papers thus forwarded, the justice endorsed: ‘The Court decides that a Spanish minister is just as liable to answer in this court for the payment of his debts as any other person.—William C. Barrett, Justice of the Peace.’ It does not appear, however, that any further proceedings were taken. Mr. Evarts sent the papers to the Attorney General, referring to Barrett's persistence in exercising his judicial functions after having been informed of the laws of the United States on the subject, and said that, upon the matter being brought to the attention of the governor of New York, measures doubtless would be taken to stay further proceedings and to prevent the recurrence of like proceedings in the future; but that, should the authorities of New York fail to act on this suggestion, it might be necessary to determine what course it would be proper to pursue towards the justice of the peace and other parties to the proceedings, under the laws of the United States.”

Moore, *op. cit.*, vol. IV, p. 639.

“The Department of State having been officially informed that the sheriff of Newport County, R. I., had made personal service of judicial process upon Mr. Bartholomei, Russian minister in the United States, in a civil action, Mr. Blaine declared that the service in question was clearly a violation of diplomatic privilege and suggested to the governor of Rhode Island that, if the suit should be followed up, the attorney general of the state should be instructed to appear, not as the representative of the Russian minister, but *ex officio*, and call the

court's attention to the minister's privilege and move for the termination of the proceedings. Mr. Blaine added, that while the provisions of the act of 1790 in terms related to the extreme case of an attempt to arrest the person or attach the property of a foreign minister, yet it was clear that the service of any process on such a minister was 'an infringement of his privilege and an abuse of the process of the court.'"

Moore, *op. cit.*, vol. IV, pp. 639-640.

"In Austria, the civil code merely confers on a diplomatic agent whatever immunities are established by International Law—a somewhat uncertain criterion. The German code uses similar language, and it is inferable from language used in 1844 by Baron von Bülow, in writing to the United States minister, Mr. Wheaton, that the widest possible interpretation would be given to such a provision. In Spain, an ambassador is exempt from being sued for debts incurred before the commencement of his mission, but is deprived of this immunity during its continuance. In Russia, a claim against a diplomatic agent must be presented to the Ministry of Foreign Affairs. In Japan, some years ago, a British subject employed in another legation than that of his own country asked his own minister to intervene in order that he might obtain payment of his salary; he was told to apply to the British representative at the Court which his employer represented, who could, if he thought fit, bring the complaint to the notice of the Ministry for Foreign Affairs of that country. As the privilege is accorded to the suite on account of the ambassador, and not on account of his sovereign, it may be waived by the former; and it was waived by the ambassadors at the Congresses of Münster and Nijmegen. But it cannot be waived in the case of any subordinate officer of the embassy or legation appointed by the sovereign himself."

Satow, *op. cit.*, vol. 1, p. 254.

"The offense described in secs. 4063 and 4064, Revised Statutes, is not complete until execution of the writ. The mere issuance of a writ without anything more would not, under the law of nations, be deemed an invasion of diplomatic rights. A letter informing the minister that the writ has been issued may be an affront, but is not more so than a dunning letter or a threat to sue. In such a case, the writ not having been served, the annulment of the execution and judgment exhausts the power of the court, and the statutes of the United States do not afford any further redress."

Moore, *op. cit.*, vol. IV, p. 640.

"As diplomatic officers are exempt from process in civil suits by a statute which neither the courts nor the executive can dispense with, the Department of State can not aid the courts in enforcing the payment of debts by diplomatic officers. The only way the Depart-

ment can intervene is by asking for the officer's recall. 'In order, however, to warrant such a step, the person involved would have to be shown to be guilty of such misconduct as to make his presence in this country in a representative capacity undesirable. His failure to discharge a debt at a particular time would not, it is thought, be alone a sufficient ground for such serious international action.'

Moore, *op. cit.*, vol. IV, p. 641.

3. EXCEPTIONS TO IMMUNITY.

"Diplomatic agents also enjoy immunity from jurisdiction in civil matters. They are exempt in principle, but there are important exceptions like the following:

"(1) Real actions, relating to immovables which the minister possesses in the country to which he is sent. With the exception of his residence, these are subject to territorial jurisdiction.

"(2) When the agent or minister engages in a trade, profession, or in commerce, he is subject to local jurisdiction in his business or professional dealings.

"(3) If he acts in a fiduciary character, such as guardian or trustee, he is liable for the obligations contracted in this capacity.

"(4) When the minister, whether with or without the authorization of his government, voluntarily submits to judicial process without pleading his immunity, or if he himself sets the machinery of justice in motion. In such cases he must bear the judicial consequences of his action, though the means of execution would probably be limited to any real property he may possess.

"But as a general rule, diplomatic agents are not subject to suit for debt or in any civil action, and their movable property can not be seized, attached, or confiscated. Injured parties should address themselves to the Minister of Foreign Affairs, who may, at his discretion, bring the matter to the attention, first of the accused public minister, and later, if deemed advisable, to the Government he represents."

Hershey, *op. cit.*, pp. 289-290.

"But to the general exemption of a public minister from the local jurisdiction of the country of his residence, there are certain exceptions which are well recognized and established in international jurisprudence. These exceptions are: (1) Where he plots against the safety of the Government to which he is accredited; (2) Where he owes allegiance to the country of his residence; (3) Where he has been received on condition of renouncing any claim to be exempt from the local jurisdiction.

"The first of these can hardly be considered a full exception to the general rule of exemption, for it only authorizes the enforcement of

local jurisdiction, and the exercise of local authority, so far as may be necessary for the defence of the State. 'In cases of offences,' says Wheaton, 'committed by public ministers affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country.' In all other cases it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended State to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the State thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person, if justice should be refused by his sovereign. But the circumstances which would authorize such a proceeding are hardly capable of precise definition, nor can any general rule be collected, from the examples to be found in the history of nations, where public ministers have thrown off their public character and plotted against the safety of the State to which they are accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. Grotius distinguishes here between what may be done in the way of self-defence, and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as punishment for a crime after it has been committed, yet this law does not oblige the State to suffer him to use violence without endeavoring to resist it. The weight of authority is, that an ambassador can not be *punished* by the Government to which he is accredited, for plotting against it, although he may be *forcibly resisted*, and if necessary, *forcibly ejected* from the country.

"In the second case, that is, where the minister owes allegiance to the country where he resides and has been received on condition of renouncing any claim to be exempt from the local jurisdiction—a question may arise as to whether such minister is to be considered as really the representative of the country by which he is accredited. And if he is to be regarded as such representative, can the renouncement of his privilege of exemption from local jurisdiction extend to the *inviolability* of his person and office? In other words, must not such renouncement, however general in its terms, be limited to his right of *extraterritoriality*, and with respect to civil jurisdiction only? Would it not be utterly incompatible with his official character for him to submit to be tried and punished under the local laws as a criminal? But these questions will be more particularly considered in the following paragraphs. The case here supposed is one of theory only, and of little practical importance in modern jurisprudence, as States now

never permit their ministers to make any such general renouncement of their diplomatic rights and character.

“In the third case, that is, where the minister makes a special renouncement of his privilege of exemption and voluntarily submits to the local jurisdiction, several important questions will arise with respect to the manner of making the renouncement, and with respect to the extent of jurisdiction which may be exercised, even where the renouncement is duly made. In the first place, is it sufficient that the minister himself renounces his privileges of exemption, and submits to local jurisdiction, in order to authorize the courts to exercise that jurisdiction; or is it necessary to have the permission of his own government for that purpose? Admitting the necessity of such assent or permission, how is the government to which he is accredited, or its local authorities, to ascertain the fact? Can they go behind the act of the minister to examine his instructions, or to judge between him and his government, as to his authority to act in a matter of this kind? In doing so, would they not assume the character of *Mentor* over the representative of a foreign State? No doubt the act of the minister must be presumed to have the consent of his government, to which alone he is responsible. But this consent being presumed, and the renouncement being within the acknowledged limits of the minister's powers, how is it to be made? Wicquefort is of opinion that a minister who contracts before a notary (*qui avait contracté par-devant notaire*) thereby renounces his privilege of exemption from local jurisdiction, so far as concerns that particular contract. In the case of Mr. Wheaton, who, when American minister at Berlin, had entered into a contract of lease for the house in which he resided, the landlord, on his removal at the expiration of the lease, retained the minister's goods as security for alleged damages to the premises, under a general provision of the Prussian civil code, giving him the right to the goods of a tenant, as hypothecated for the payment of the debt. The Prussian government, when appealed to by the American minister, refused to interfere. The municipal law of most countries gives to the landlord a lien upon the goods of the tenant as security for payment of the rent. If the goods or property be instrumentality of sovereignty the local court should not enforce the lien by compulsory process, even if the case be one in which the law would create a lien on property as between citizens. If in the case of Mr. Wheaton the landlord claimed only a lien, to enforce which he would be obliged to invoke the aid of the local court, and the property was of a kind which would be exempt from seizure by direct process, it should have been secured to Mr. Wheaton. But if Mr. Wheaton had pledged the goods to the landlord by a formal contract, he might be considered as having waived his privilege in respect of them. In the case of M. de Sil-

veira, *conseiller* of the Portuguese legation at Paris, who had been separated from his wife, and had entered into a contract to give her a certain allowance, in which the parties had declared themselves to be domiciled in Paris, and the husband had deposited for this allowance a certain sum in the *Caisse de Consignations*; in a suit by his wife for, among other things, the said alimentary allowance, he pleaded his exemption as diplomatic agent. This title was not contested, and the courts admitted his general exemption from local jurisdiction, but sustained it with respect to the alimentary provision. But neither the opinion of Wicquefort nor the cases above referred to, are regarded as good authority. The better opinion is, that there must be a special submission to local jurisdiction in the particular case, either directly made, or necessarily implied, by the act of bringing suit as plaintiff, or of consenting to appear as defendant, in a civil action; and certainly, a renouncement of the privilege of exemption must be equally as unequivocal in criminal proceedings. Supposing the renouncement of the diplomatic privilege and submission to local jurisdiction, to be duly made, we have next to inquire into the *extent* of jurisdiction which is conferred by such acts, and may be lawfully exercised by the local tribunals. We shall consider this question, *first*, with respect to civil suits, and *second*, with respect to criminal matters."

Halleck, *op. cit.*, vol. 1, pp. 363-367.

"There are, however, exceptions to this rule of exemption from civil jurisdiction.

1. "When he submits to the local jurisdiction (a very unlikely case). Some writers insist that the consent of his government is necessary, and so it may be, as between him and them. But the local court is not bound to inquire whether he has obtained their consent. As far as the court is concerned his submission is sufficient. He can only be held to have submitted to the jurisdiction so far as that the judgment of the court does not interfere with his personal liberty, or the property exempted in virtue of his office.

2. "If he has chosen to bring an action himself. In this instance he merely obliges himself to plead to a cross action, and, like a sovereign in similar circumstances, to comply with the rules of the court. The plaintiff ambassador makes himself liable to the *counter-demands*, which are a mode of defense, and to condemnation in costs, if the suit fails. On the other hand, if the suit succeeds, and the defendant prosecutes an appeal, which is also a mode of defense, the ambassador can not decline the jurisdiction of the superior court.

3. "All private property except what is necessary for the exercise of his functions is subject to the local jurisdiction. Thus he is subject to actions for breach of contract; if he goes into trade, or be-

comes a shareholder in a local company, his property is liable to seizure and condemnation at the suit of his creditors; if he acts as executor he is liable to suits brought against him in that capacity. 'But in any suit or seizure intended to bind them [*i. e.*, lands or goods held by him in any of those capacities], through the action of the local courts, the fiction of the minister's extritoriality must be kept up by proceeding against him in the form usually employed against any other absent person reputed to be out of the country.'

Satow, *op. cit.*, vol. 1, pp. 252-253.

"This immunity extends, not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides.

"The minister's person is, in general, entirely exempt both from the civil and criminal jurisdiction of the country where he resides. To this general exemption there may be the following exceptions:

"1. This exemption from the jurisdiction of the local tribunals and authorities does not apply to the *contentious* jurisdiction, which may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law.

"2. If he is a citizen or subject of the country to which he is sent, and that country has not renounced its authority over him, he remains still subject to its jurisdiction. But it may be questionable whether his reception as a minister from another power, without any express reservation as to his previous allegiance, ought not to be considered as a renunciation of this claim, since such reception implies a tacit convention between the two States that he shall be entirely exempt from the local jurisdiction.

"3. If he is at the same time in the service of the Power who receives him as a minister, as sometimes happens among the German courts, he continues still subject to the local jurisdiction.

"4. In case of offenses committed by public ministers, affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country. In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended State to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the State thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person, if justice should be refused by his own sovereign. But the circumstances which would authorize such a proceeding are hardly capable of precise definition, nor can any general rule be collected from the examples to be found in the history of nations, where public

ministers have thrown off their public character, and plotted against the safety of the State to which they were accredited. These anomalous exceptions to the general rule resolve themselves into the paramount right of self-preservation and necessity. Grotius distinguishes here between what may be done in the way of self-defense and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as a punishment for a crime after it has been committed, yet this law does not oblige the State to suffer him to use violence without endeavoring to resist it."

· Wheaton (8th ed.), pp. 300-302.

"There are some exceptions, moreover, to the privilege respecting personal property, viz:—

"1. When the ambassador becomes a trader or a merchant in the country to which he is sent, the property embarked by him, or accruing to him, in *this* capacity, is liable to seizure and condemnation, at the instance of creditors, in the same manner as the property of any other trader or merchant, in countries where such seizure can take place without personal service on the ambassador and without trenching on his dignity and the due discharge of his diplomatic functions. This subject underwent discussion in the case of the *Charkieh*.

"It has been ruled in England that a public minister of a foreign state accredited to and received by the Sovereign of this country, having no real property in England, and having done nothing to disentitle him to the general privileges of such public minister, can not, while he remains such public minister, be sued against his will, in this country, in an action: although such action may arise out of commercial transactions by him here, and although neither his person nor his goods are touched by the suit.

"Although the courts in this country can not make an order against an ambassador who does not submit himself to the jurisdiction, yet the Court of Chancery will restrain a third party from handing over to him a fund the right to which is in dispute, notwithstanding his title to the fund may be absolutely at law.

"There may sometimes be difficulty in deciding whether the property belong to him in the capacity of ambassador or merchant, and in all cases of reasonable doubt the ambassador should be allowed the benefit of it. The law was correctly laid down on this subject of the merchant-ambassador by the Dutch Tribunal, in 1720-1, when the Envoy Extraordinary of the Duke of Holstein was sued by his creditors for mercantile debts contracted by him; and the Courts at the Hague granted a decree of arrest and citation against him. The arrest was to operate on all goods, money, and effects within the

jurisdiction of the tribunal, with the exception of the movables, equipages, and other things belonging to him in his character of ambassador.

“By ‘money’ (*Penningen—deniers—pecunia numerata*), Bynkershoek says the Court clearly intended to include only money embarked in the particular mercantile speculations; and he adds, that as it must be always difficult to distinguish this money from that which belongs to the ambassador for other purposes, it would be wiser and fairer to omit money, and include it among the things necessarily appertaining to the office of legation.

“This instance is memorable, not merely on account of the correct enunciation of the law to which it gave rise, but also because it furnished Bynkershoek with the occasion of writing his excellent treatise ‘*De Foro Legatorum*.’

“In truth, every State ought, by expressly forbidding their ambassadors to combine engagements in private trade or commerce with the sacred duty of representation, to prevent any question of the kind from ever arising. The Roman law on this point deserves to be imitated: ‘*Enim qui legatione fungitur, neque alienis neque propriis negotiis se interponere debeat.*’

“It would, however, be perhaps difficult and harsh to prevent the ambassador from acting in the fiduciary character of trustee or testamentary executor; any property accruing to him in these capacities is not within the shelter of extraterritorial privilege.

“2. Another exception is furnished by the case of the ambassador who becomes voluntarily a plaintiff in a cause, which act implies the consent of his master. The plaintiff-ambassador makes himself liable to the *counter demands* (*reconventiones*), which are a mode of *defence*, and to condemnation in costs, if the suit fail.

“The Roman law says justly, ‘*Qui non cogitur in aliquo loco iudicium pati, si ipse ibi agit, cogitur excipere actiones et ad eundem iudicem mitti.*’

“On the other hand, if the suit succeed, and the defendant prosecute an *appeal*, which is also a mode of defence, the plaintiff-ambassador can not decline the jurisdiction of the Superior Court.

“3. There is also a kind of *defensive* jurisdiction, so to speak, which may be exercised over ambassadors as over other foreigners—a jurisdiction which has for its object to *prevent* the ambassador from doing some civil injury, namely, the jurisdiction of *interdict*, according to the Roman, and of *injunction* according to the English Law. Such (*een Mandament van Complainte en een Mandament van Sauvegarde*) appears to have been exercised by the Dutch tribunal, in 1644, against the Swedish Ambassador.

“So Albericus Gentilis and Bynkershoek are both of opinion that the ambassador might on account of the dangerous condition of his

house, or for other causes threatening his neighbour with injury, be subject to that class of actions familiar to the Roman Law, through which the Praetor administered an immediate temporary remedy against an impending wrong. It is clear that the Provincial Legates of Rome were not exempt from this kind of jurisdiction; and both the authorities above mentioned conceive that the reason of the thing renders the principle of that law applicable in this particular to modern ambassadors.

“ With these exceptions, all civilized nations unanimously accord to ambassadors complete exemption from the civil jurisdiction of the country in which they reside.”

Phillimore, *op. cit.*, vol. II, pp. 222-225.

IV. IMMUNITIES OF ATTACHÉS, ETC., THE FAMILY AND SUITE AND THE SERVANTS OF DIPLOMATIC AGENTS.

“ The immunities of the members of a diplomatic minister’s family and household are granted to them because his comfort and dignity could not be properly provided for unless they were free to a great extent from the local jurisdiction. His wife not only shares his personal inviolability, but is also a partaker of the ceremonial honors paid to him. His children occupy a similar position; and his chaplain and private secretary are certainly free from arrest, as also are the messengers and couriers attached to the embassy. It is generally held that the regular servants of the minister, as distinct from such persons as workmen temporarily employed about the premises, or individuals who give up but a small portion of their time to their duties in connection with the embassy, are exempt from the local jurisdiction. But there is no uniform practice as to the extent of their immunities, nor is there any agreement among the general body of civilized states as to what their privileges ought to be. The law of England on the subject, as embodied in a statute that is always held by British judges to be declaratory of the law of nations, declares void all writs and processes issued against them, unless they are traders. But in criminal matters the British authorities claim a right to exercise jurisdiction over the servants of the embassy, if the offence is committed outside the minister’s residence. In most countries they would not be arrested without the special permission of the ambassador; and in modern times difficulties are generally prevented by the exercise of tact and judgment. If the servant of a public minister commits a criminal offence, his master either dismisses him from his service, and thus puts an end at once to all claims for immunity, or hands him over to the local authorities to be dealt with according to their law. Only when the offence is serious, and is committed within the residence of the minister, does he, as a rule, arrest the per-

petrator and send him home for trial. In civil cases he grants permission for his servants to be proceeded against in the local courts. In order to avoid misunderstandings and controversies as to the persons entitled to immunity, most states require the heads of the foreign legations to send periodically to the secretary for foreign affairs a list of the members of their suites and the servants of their employ."

Lawrence, T. J., *op. cit.*, pp. 315-316.

"Besides the persons who are on the diplomatic staff of the mission, immunity from the territorial jurisdiction, civil or criminal, is generally enjoyed by those who are living with them as part of their family or household, and to those who are in their fixed service, as distinguished from persons, such as workmen, occasionally employed by them. But the service must be real and not colourable, and the immunity will not extend to matters quite unconnected with the service; also the ambassador or minister may waive the immunity of any one not on the diplomatic staff, but not his own or that of a member of the mission, their immunity being the right of their state. He usually furnishes to the local authorities a list of the members and suite of his mission, but to be named on such a list 'is no condition precedent to the being entitled to the privilege of a public minister's servant.' An attempt made by the court of Bavaria in 1790 to assert the local jurisdiction over persons in attendance on the members of a mission did not succeed in attracting sympathy. The exception which obliged us to limit our statement of the foregoing by the word 'generally' is that in England an exemption from the local criminal jurisdiction is not allowed to any one not on the diplomatic staff. Thus in 1653, under Cromwell, Don Pantaleon Sa, brother of the Portuguese ambassador, was tried and executed for murder; and in 1827 the Foreign Office justified the arrest of the coachman of Mr. Gallatin, the United States minister, for an assault, although the arrest was made in the minister's stable, only admitting 'that courtesy requires that their houses [those of foreign ministers] should not be entered without permission being first solicited, in cases where no urgent necessity presses for the immediate capture of an offender.'"

Westlake, *op. cit.*, vol. 1, pp. 280-281.

"The immunities of a diplomatic agent are extended to his family living with him, because of their relationship to him, to secretaries and attachés, whether civil or military, forming part of the mission but not personally accredited, because of their necessity to him in his official relations, and perhaps also to domestics and other persons in his service not possessing a diplomatic character, because of their necessity to his dignity or comfort. These classes of persons have thus no independent immunity. That which they have, they claim, not as sharing in the representation of their State, nor as being neces-

sary for its service, but solely through, and because of, the diplomatic agent himself. Hence in practice the immunity of servants and of other persons whose connection with the minister is comparatively remote, is very incomplete; and it may even be questioned if they possess it at all in strict right, except with regard to matters occurring between them and other members or servants of the mission. It is no doubt generally held that they can not be arrested on a criminal charge and that a civil suit can not be brought against them, without the leave of their master, and that it rests in his discretion whether he will allow them to be dealt with by the local authorities, or whether he will reserve the case or action for trial in his own country. But in England, at any rate, this extent of immunity is not recognized. Under the statute of Anne, the privilege of exemption from being sued, possessed by the servant of an ambassador, is lost by 'the circumstance of trading'; and when the coachman of Mr. Gallatin, the United States minister in London, committed an assault outside the house occupied by the mission the local authorities claimed to exercise jurisdiction in the case. The English practice is exceptional; but it is not unreasonable. The inconvenience would be great of withdrawing cases or causes from the tribunals of the country in which the facts giving rise to them have occurred; and at the same time it can not be seriously contended that either the convenience or the dignity of a minister is so affected by the exercise of jurisdiction over nondiplomatic members of the suite, and it might perhaps even be said, over nonaccredited members of the mission, as to render exemption from it, except when such exemption is permitted by the diplomatic agent, an imperative necessity. Happily there is little difference in effect between the received and the exceptional doctrine. No minister wishes to shield a criminal, and there is no reason to believe that permission to exercise jurisdiction is refused upon sufficient cause being shown.

"In order that a person in nondiplomatic employment shall be exempt from the direct action of the territorial jurisdiction it is always necessary that he shall be engaged permanently and as his regular business in the service of the minister. Residence in the house of the latter, on the other hand, is not required. Questions consequently may arise as to whether a particular person is or is not in his service in the sense intended; they have even sometimes arisen as to whether a person has been colorably admitted into it for the sake of giving him protection. With the view of obviating such disputes it is the usage to furnish the local authorities with a list of the persons for whom immunity is claimed, and to acquaint them with the changes which may be made in it as they occur."

Hall, *op. cit.*, 188-190.

"To a greater or less degree, these immunities are shared by the family and suite of the envoy. His retinue or suite include:

"(1) The members of his family, as wife, children, and other near relatives living under his roof.

"(2) His official suite and their families, such as Councillors, Naval and Military Attachés, Secretaries of Legation, the Chancellor of the Legation, various assistants, clerks, interpreters, the chaplain, doctor, official legal adviser, and the like.

"(3) Couriers or bearers of dispatches.

"(4) Domestics like private secretaries, tutors, and servants, such as cooks, coachmen, etc.

"It is generally agreed that the various members of the family and of the official suite of the envoy, together with their families, enjoy the same inviolability and the same immunities that he himself does. Children born to them during their mission are regarded as having been born on the territory of the home State. These privileges can not be waived without the consent of the home government. They are also shared by couriers or dispatch bearers of the legation (who also share in the right of innocent passage through third States) during the performance of their duties. The dispatches they bear are also exempt from search and seizure.

"It is also customary to grant exemption from civil and criminal jurisdiction to all persons in the private service of the envoy or of members of his legation, provided such persons are not nationals of the receiving State. But these privileges may be waived at discretion, and mere servants or domestics can not claim exemption from taxes, immunity of domicile, or freedom from arrest for crime committed outside the residence of their employers. In case of arrest, they should, however, be released if the envoy refuses to waive their immunity from criminal jurisdiction.

"Mere visitors and hangers-on of the embassy do not enjoy diplomatic privileges and immunities. They do not necessarily extend to consuls as such, public or secret political agents, military or naval officers, or mere commissioners not clothed with a diplomatic character. But they do extend to the judges of The Hague Tribunal or Court of Arbitration and of the International Prize Court, members of official international congresses and conferences, and, in general, to all agents clothed with a diplomatic or representative character. It should be added that if a State consents to receive one of its own nationals in a diplomatic capacity, it should extend to him all privileges and immunities belonging to his mission, unless it has made their abandonment a condition of his reception."

Hershey, *op. cit.*, pp. 293-295.

"The wife and family, servants and suite, of the minister, participate in the inviolability attached to his public character. The

secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps, in respect to their exemption from the local jurisdiction.

“The municipal laws of some, and the usages of most nations, require an official list of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs, in order to entitle them to the benefit of this exemption.

“It follows from the principle of the extraterritoriality of the minister, his family, and other persons attached to the legation, or belonging to his suite, and their exemption from the local laws and jurisdiction of the country where they reside, that the civil and criminal jurisdiction over these persons rests with the minister, to be exercised according to the laws and usages of his own country. In respect to civil jurisdiction, both contentious and voluntary, this rule is, with some exceptions, followed in the practice of nations. But in respect to criminal offenses committed by his domestics, although in strictness the minister has a right to try and punish them, the modern usage merely authorizes him to arrest and send them for trial to their own country. He may, also, in the exercise of his discretion, discharge them from his service, or deliver them up for trial under the laws of the state where he resides; as he may renounce any other privilege to which he is entitled by the public law.”

Wheaton (8th ed.), pp. 302-303.

“It is agreed that the ambassador himself, and his family and suite, are entitled to immunity. The question is, Who are comprehended within the terms ‘family and suite?’ The test must be, again, its effect upon the convenience of nations. It is reasonable that the immunity should be extended to the wife and children of the minister, and to such other persons as in good faith, are permanent members of his family; and that it should not extend to mere visitors. It is impossible to make, in advance, a classification applicable to all cases. If a case arises respecting persons in a doubtful position between mere visitors and permanent members of the family, it must be settled on its own circumstances.

“As to the suite, all writers and all practice agree that the official suite are protected; and by ‘official suite’ is meant persons employed directly in diplomatic duties, appointed or recognized by the ambassador’s Government as diplomatic functionaries. But doubts, it has been seen, are thrown out whether the immunity extends further. But surely the convenient discharge of his duties, according to the customs of society, requires that the ambassador shall have the necessary services, about his hotel and his person, of people usually employed in those capacities. If he is an invalid or temporarily ill, a

nurse or body servant is a necessity, and a right to free transportation, according to the customs and necessities of society, in his private carriage, and to the performance of offices in his household by proper persons, is reasonable. Although it may be that high officials, in their own country, have no such general immunity for their servants and residences, still, in the case of a sole representative of his nation, under foreign and not necessarily friendly jurisdiction, the dignity and convenience of nations is best secured by a rule which shall give large protection, leaving the concessions and accommodations to comity and good faith in cases as they may arise. Here, again, a classification, in advance, of what shall in all cases be the personal suite of an ambassador entitled to exemption, is not practicable. The doubtful cases must rest on their circumstances. A mode sometimes adopted is for the minister to transmit to the Foreign Office a list of his official and personal suite; and, if the Foreign Office thinks it an unreasonable one, objection can be made and the matter settled at the time."

Dana's note to Wheaton, pp. 305-306.

"The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps in respect to their exemption from local jurisdiction. 'The ambassador's secretary,' says Vattel, 'is one of his domestics; but the secretary of the embassy has his commission from the sovereign himself, which makes him a kind of public minister, and he, in himself, is protected by the law of nations, and enjoys immunities independent of the ambassador, to whose orders he is indeed but imperfectly subjected, sometimes not at all, and always according to the determination of their common master.'

"The attachés, and the wife and family of a minister, participate in the inviolability attached to his public character. 'The persons in an ambassador's retinue,' says Vattel, 'partake of his inviolability; his independency extends to all his household; these persons are so connected with him that they follow his fate. They depend immediately on him only, and are exempt from the jurisdiction of the country into which they would not have come, but with this reserve. The ambassador is to protect them, and whenever they are insulted, it is an insult to himself. * * * The ambassador's consort is intimately united to him, and more particularly belongs to him than any other person of his household. Accordingly, she shares his independency and inviolability; even distinguished honours are paid her, which in some measure could not be denied her without affronting the ambassador. For these, most courts have a fixed ceremonial. The regard due to the ambassador communicates itself likewise to his children, who also partake of his immunities.'

“‘The practice of nations,’ says Wheaton, ‘has also extended the inviolability of public ministers to the messengers and couriers sent with dispatches to or from the legations established in different countries. They are exempt from every species of visitation and search, in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own Government, attesting their official character; and, in case of dispatches sent by sea, the vessel, or *aviso*, must also be provided with a commission or pass. In time of war, a special agreement, by means of a cartel or flag of truce, with passports, not only from their own Government, but from its enemy, is necessary for the purpose of securing these dispatch vessels from interruption, as between the belligerent powers. But an ambassador, or other public minister resident in a neutral country, for the purpose of preserving the relations of peace and amity between the neutral State and his own Government, has a right freely to send his dispatches in a neutral vessel, which can not lawfully be interrupted by the cruisers of a power at war with his own country.’ On this subject Vattel very justly remarks: ‘Couriers sent or received by an ambassador, his papers, letters, and dispatches, all essentially belong to the embassy, and are consequently to be held sacred; since, if they are not respected, the legitimate objects of the embassy could not be attained, nor would the ambassador be able to discharge his functions with the necessary degree of security.’ These states general of the United Provinces decided, whilst the President Jeannin resided with them as ambassador from France, that to open the letters of a public minister is a breach of the law of nations. Other instances may be seen in Wicquefort. That privilege, however, does not, on certain momentous occasions, when the ambassador himself has violated the law of nations by forming or countenancing plots or conspiracies against the State, deprive us of the liberty to seize his papers for the purpose of discovering the whole secret and detecting his accomplices; since, in such an emergency, the ambassador himself may lawfully be arrested and interrogated. An example is furnished us in the conduct of the Roman Government, who seized the letters which a treasonable junto had committed to the hands of Tarquin’s ambassador.

“The domestics and servants of a minister were formerly said to participate in the inviolability attached to his public character. ‘Did not the domestics,’ says Vattel, ‘and household of a foreign minister solely depend on him, it is known how very easily he might be molested and disturbed in the exercise of his functions.’ But exemption to persons of this class is now very grudgingly extended. In matters of police they should be proceeded against without hesitation, unless the minister himself claims their exemption for some

genuine and valid reason. The municipal laws of some States, and the usage of most nations require an official list of the domestic servants of foreign ministers to be communicated to the Minister of Foreign Affairs, in order to entitle them to any of the exemptions alleged to be due to them by virtue of their being dependents of a foreign legation. It was at one time contended that the subjects of the State to which a public minister is accredited do not participate in his rights of extra-territoriality, but are justifiable by the tribunals of their country. But the better opinion seems to be that, although such State may prohibit its subjects from becoming the employees or servants of a foreign minister, if it do not so prohibit them, they are, while so employed, to be considered without the limits of its jurisdiction.

“It must be observed that the minister himself can afford no ‘protection’; it is the law which gives a public character to his family, domestics and servants. Hence, a mere appointment by a minister or any person as a member of his household is, in itself, no protection to such person. It must be shown that he is *bona fide* the officer or servant of such household, and that he performs the duties corresponding to the position or office which he pretends to hold. A court will inquire if his appointment is a fair *bona fide* transaction, and if not, the privilege claimed will not be allowed. The same may be said of the goods of persons claiming such privilege; if they are not *bona fide* members of such household, or are engaged in other business or trade, their goods are not exempt from process for debts, rents, etc. Ministers have not unfrequently attempted to protect the persons and property of their friends from arrest or attachment, or execution, by pretended appointments to positions in their household, but the courts have very properly refused to give any countenance to such frauds.”

Halleck, *op. cit.*, vol. 1, pp. 353-357.

“It is customary for a diplomatic representative to furnish to the local government a list of the members of his household, including his hired servants, with a statement of the age and nationality of each. When this is requested, it should always be given.”

Instructions to Diplomatic Officers of the U. S. (1897), p. 21.

“These extraterritorial privileges are also extended, by positive International Law, as much as the rights of inviolability, to the family, and especially to the wife, of the ambassador. She is entitled to ceremonial honors, according to the usage of courts, and any affront offered to her is a special indignity to the ambassador: the same remark applies to his family. It is not competent to any member of the family to waive this privilege. His suite or train (*comites*) are also entitled to these privileges, a violation of which in their persons

affects the honour, though in a less degree, of their chief. In this suite, couriers employed in carrying despatches are of course included.

"As the privilege is accorded to the suite on account of the ambassador, and not on account of his Sovereign, it may be waived by the former; and it was waived by the ambassadors at the Congresses of Münster and Nimeguen. But it can not be waived in the case of any subordinate officer of his household appointed by the Sovereign himself.

"The *Secretary of Legation* being so appointed, is especially, and of his own right, entitled to these privileges, and to a certain right, his appointment being notified to the Minister of Foreign Affairs. The *Secretary to the Embassy*, though unfavourably distinguished from the others in these particulars, has been usually considered as an official person distinct from the general suite. Difficulties have arisen from persons, perhaps not subjects of the State from which the embassy is sent, claiming, without sufficient warranty, to belong to it. It has therefore been enacted by the municipal laws of some countries, and it ought to be the usage of all, to require a list of the persons composing the suite to be delivered to the Minister for Foreign Affairs, or other proper officer.

"In England especial provision has been made concerning the arrest of foreign ambassadors, or other foreign public ministers, and their domestics, or domestic servants, by the Statute 7th Anne, c. 12, which makes any process against them, or their goods and chattels, altogether void; and provides, that the persons prosecuting, soliciting, or executing such process, shall be deemed violators of the Law of Nations, and disturbers of the public repose, and shall suffer such penalties and corporal punishment as the Lord Chancellor and the two Chief Justices, or any two of them, shall think fit. But no trader within the description of the Bankrupt laws who shall be in the service of any ambassador, or public minister, is to be privileged or protected by this Act; nor is any one to be punished for arresting an ambassador's servant, unless the name of such servant be registered in the office of one of the principal Secretaries of the state, and by him transmitted to the Sheriffs of London and Middlesex, or their undersheriffs or deputies.

"This Act itself was, as Lord Chief Justice Abbott remarked, only declaratory and in confirmation of the Common Law. It must, therefore, be construed according to the Common Law, of which the Law of Nations must be deemed a part."

Phillimore, *op. cit.*, vol. II, pp. 226-228.

THE CASES OF SECRETARIES OF EMBASSY OR LEGATION.

"One of the secretaries of the British embassy was arrested in 1904 at Lenox, Massachusetts, charged with running an automobile at an

unlawful speed, and taken before a local magistrate. The secretary pleaded his diplomatic exemption from arrest, which the judge refused to recognize, and inflicted a fine. The matter was made the subject of diplomatic intervention; upon the governor calling on the magistrate for an explanation of his conduct, the latter stated that he had no knowledge of the United States statute; the fine was remitted, the proper apology was made, and the incident was closed.

"During the same year the police of Washington reported that the counselor of the French embassy had been guilty of speeding his automobile, in violation of law, and then asserting his diplomatic exemption from arrest. The city government made complaint to the secretary of state, and the latter referred the communication to the French ambassador, who in reply stated to the secretary of state that the counselor did not admit that he had driven his machine at a speed prohibited by law, but he declared that if such was the fact he was sincerely sorry, for it must have been an inadvertence, as he was always desirous of obeying the laws with the most punctilious regard. The ambassador expressed the hope that this statement would be acceptable, and it was so received by the city government."

Foster, *op. cit.*, pp. 163-164.

"The Spanish minister in the United States complained of a breach of the privilege of his secretary of legation, Mr. Rivas y Salmon, who resided at Philadelphia, at the hands of a Mr. Kirk. The matter was brought to the attention of Mr. Ingersoll, United States district attorney at Philadelphia, who instituted a prosecution against Mr. Kirk, who, as it appeared had sued out a warrant for the arrest of Mr. Salmon for an assault and battery committed on his son. On the trial Mr. Kirk was acquitted. He alleged that when he swore out the warrant he was ignorant of Mr. Salmon's public character; but it appeared in any event that the warrant was not actually executed, and on this ground the court decided that the act of Congress had not been violated."

Mr. Clay, Sec. of State, to Chev. de Tacon, Span. min., Dec. 10, 1828; MS. Notes to For. Legs., IV, 98. Moore, *op. cit.*, vol. IV, p. 633.

"Whilst the President is anxious that every member of the diplomatic corps should constantly enjoy all the security and immunities which are guaranteed by the public law, it is no less his duty to exercise, if necessary, all the authority which he possesses to prevent any wrongs from being committed upon American citizens by any member of that corps. Nothing can justify any functionary of a foreign legation in taking the law into his own hands, and carving out the measure of his own redress. The President therefore expects that you will be able to make out for Mr. Salmon [secretary of legation] a satisfactory explanation or justification of the assault and battery

committed by him * * *, of the indignity offered to the process issued by a public magistrate [by tearing up a writ], and of the forcible taking from the possession of another person of certain movable property claimed by the latter."

Cited from Moore, *op. cit.*, vol. IV, p. 633.

CASES OF ATTACHÉS.

"In May, 1868, Mr. Seward brought to the attention of Baron von Gerolt the statement that two persons connected with the Prussian legation, one the secretary and the other an attaché, had been; respectively as principal and second, guilty of violating the act of Congress of February 20, 1839, to prohibit duelling in the District of Columbia, and asked, in the name of the President, that, as the persons in question were 'protected by the law of nations from judicial prosecution for a violation of the statute aforesaid,' the matter be brought to the attention of their government, in order that they might 'in a proper manner be made sensible of its displeasures.'"

Mr. Seward, Sec. of State, to Baron von Gerolt, May 11, 1868, MS. Notes to Prussian Leg. VIII. 58. Moore, *op. cit.*, vol. IV, p. 634.

"The executive department of this government can take no proceedings against persons who have the immunity attached to the diplomatic character except to ask their own government to recall them from this country."

Cited from Moore, *op. cit.*, vol. IV, p. 634.

"In July, 1892, an attaché of the Swiss legation at Washington was arrested at Bay Ridge, Md., by a deputy sheriff, on the complaint of a woman who, having lost her pocketbook, which was afterwards found, charged the attaché with having taken it. The deputy sheriff, though advised by the attaché of his official character, took him before a magistrate for examination, and, besides searching his pockets and examining their contents, declined to send to the Department at Washington a telegram which the attaché gave him with the money to pay the necessary charges. The Department of State, on being acquainted with the facts, expressed its regret and submitted the matter to the governor of Maryland, who caused the deputy sheriff to be discharged and expressed regret at the occurrence. The Swiss Government treated this action as a satisfactory termination of the incident."

Cited from Moore, *op. cit.*, vol. IV, p. 635.

"The debtor was a British subject who up to July, 1890, had carried on business in London. In January, 1891, he was appointed by the Persian ambassador an honorary attaché of the embassy, having previously been consul-general for Persia in London, and his name

was sent into the foreign office as a member of the ambassador's suite. His appointment was in no way recognized by the British Government. In March, 1891, a judgment was obtained against him, by consent in an action commenced in July, 1890, in respect of transactions connected with the business he carried on. A petition in bankruptcy was presented against him in May, 1891, founded upon that judgment debt, and the debtor claimed immunity from all civil process as a member of the Persian embassy. Held, that he was not entitled to the privilege claimed, his appointment having been obtained for the purpose of protecting him against his creditors, and having been inadvertently made by the Persian ambassador."

Ex parte Cloete, 65 Law T. 102. Cited from Moore, *op. cit.*, vol. IV, pp. 651-652.

CASE OF IN RE BAIZ (QUESTION OF DIPLOMATIC CHARACTER).

"In February, 1886, the minister of foreign affairs of Honduras transmitted to Mr. Jacob Baiz, a citizen of the United States, then holding the office of Honduraean consul general at New York, an appointment as chargé d'affaires of the Republic to the government of the United States. The Secretary of State refused to receive Mr. Baiz in the latter capacity, on the ground that the immunities and privileges of a foreign minister made it inconvenient that a citizen of the country should enjoy 'so anomalous a position;' but permitted him to correspond with the Department of State on whatever diplomatic business might arise, in view of the circumstances that the office of minister was for the time being unfilled. Mr. Baiz then asked to be recognized as 'chargé d'affaires *ad hoc*, or as diplomatic agent of Honduras, for all practical as well as official purposes,' but without relief from the 'duties and responsibilities incumbent on a citizen of the United States.' The Secretary of State replied that the Department could not recognize his agency as conferring upon him any diplomatic status, and therefore declined to recognize him as chargé d'affaires *ad hoc*, which would imply that diplomatic representation was renewed in his person.

"In 1887 Mr. Baiz became consul general of Guatemala at New York, continuing also to hold the same office for Honduras.

"In January, 1889, the diplomatic representative of Guatemala, Salvador, and Honduras, who was appointed subsequently to the correspondence between the Department of State and Mr. Baiz in 1886, informed the Department of State that he was about to go to Guatemala for a short time and requested the Department to allow 'the consul general of Guatemala and Honduras in New York,' Mr. Baiz, to 'communicate to the office of the Secretary of State any matter whatever relating to the peace of Central America, which should without delay be presented.' The Secretary of State granted

this request; and in the following March information of the appointment of Mr. Blaine as Secretary of State was conveyed to Mr. Baiz in a communication addressed to him as 'Senor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador, and Honduras.' Mr. Baiz acknowledged the receipt of this note, subscribing himself as 'Jacob Baiz, consul general.' Mr. Baiz was subsequently informed in a similar manner of the appointment of a new minister from the United States to Guatemala, Salvador, and Honduras. In the list of legations in the United States issued by the Department of State in June, 1889, mention was made under the heads of Guatemala, Salvador, and Honduras of the absence of their master, and in a footnote there was the statement: 'Jacob Baiz, consul general, in charge of business of legation, New York City.' In other cases where the minister was absent the name of the chargé d'affaires *ad interim* was given with the fact and date of his presentation.

"June 29, 1889, a suit was brought against Mr. Baiz in New York by a private individual. The Department of State subsequently declined to certify that Mr. Baiz was at the time the suit was brought invested with a diplomatic character.

"Held, that the defendant did not upon the facts presented possess a diplomatic character and that in the absence of a certificate from the Secretary of State that he possessed such a character, he was not entitled to the immunities of a diplomatic officer in respect of judicial process."

In re Baiz (1890), 135 U. S., 403, 10 S. Ct., 854. This was an application by Baiz for a writ of prohibition to restrain the district court from proceeding in the suit. The court admitted official papers with reference to his public character which were not before the district court.

See *Hollander v. Baiz*, 41 Fed. Rep., 732. See also *Scott Cases*, p. 197. Cited from *Moore, op. cit.*, vol. IV, pp. 650-651.

SARMIENTO'S CASE. (QUESTION OF A PRIOR JUDGMENT).

"Your second question is this: 'Can the appointment as secretary to a foreign legation of a person whether citizen or foreigner, residing in the United States, and under an existing *judgment* against him, whether as principal or surety, for the violation of a law of the United States, confer upon him a privilege of exemption from personal arrest in execution, upon the judgment, made up before such appointment?'

"The 25th section of the act of Congress, before referred to (of April 30, 1790), declares *void* any writ or other process sued forth against a foreign minister, or *any domestic or domestic servant of such minister*; which words have been uniformly expounded by the courts of England (under the Statute of 7th Ann., c. 12, from which ours is borrowed) to include the case of secretaries.

“The 26th section of the same act. punishes with fine and imprisonment any person who shall be concerned in suing forth or executing such writ.

“The 27th section qualifies the two former sections by this proviso: ‘Provided, nevertheless, that no citizen or inhabitant of the United States, who shall have contracted debts prior to his entering into the service of any ambassador or other public minister, which debts shall be still due, and unpaid, shall have, take, or receive any benefit of this act.’

“It is true that Congress has no power to change the law of nations with regard to foreigners; but I understand this provision of the act to be in strict conformity with the law of nations. In the case of Lockwood versus Dr. Coysgarne, 3 Bur., 1676 (a case which in many of its circumstances bears a strong resemblance to that under consideration), Lord Mansfield cites a passage from Bynkershoek which is directly in point. His lordship’s words, as given by the Reporter, are these: ‘Bynkershoek, *de Foro Legatorum*, says ‘That a person in debt can not be taken into the service of a foreign minister in order to protect him,’ and indeed this would give the foreign minister a power to dispense with the private debts of the subject of this country.’

“The mischief to which Lord Mansfield points is not ideal. As little as it might have been expected from the dignity of the office, the English books abound with instances of attempts on the part of foreign ministers to screen debtors from their creditors by the abuse of this privilege, and some of those cases are marked with an audacity equalled only by their absurdity. Thus, in one case, an attempt was made to protect a debtor on the ground of his being ostler to a foreign minister, who, it was proven, never kept horses; in another, on the ground of the defendant’s being coachman to a foreign minister, who kept no coach; in a third, of his being cook to one who kept no kitchen nor culinary implements; in a fourth, of his being gardner to one who had no garden; in a fifth, of his being a physician, although there was no proof that he had ever prescribed in his life; and in a sixth, on the ground of his being English chaplain to the ambassador from Morocco, who was a Mahommedan.

“While the mischief of extending this privilege to one who was previously a debtor is palpable, there is, on the other hand, no necessity for it in relation to the honest interests of foreign nations; for there is certainly no fair necessity that the person employed either as secretary or domestic by a foreign minister should be a debtor.

“From these considerations, I am very clearly of the opinion that Mr. Sarmiento remains subject to arrest for the judgment debt to the U. S. contracted previous to his appointment, notwithstanding such appointment.

"Your third question is this: 'Is there any principle in the laws or usages of nations by which the President would be warranted in granting a pardon to F. C. Sarmiento in consideration of his appointment subsequent to the judgment against him, as secretary to the Spanish legation?'

"Mr. Sarmiento's appointment, in my opinion, imposes on the President no obligation at all to discharge from the previous judgment; and if this appointment is the only consideration for the discharge (as your question puts the case) the President would not, in my opinion, be warranted toward this nation in granting the discharge."

Opinion of Mr. Wirt, At. Gen., to Mr. Adams, Sec. of State, March 17, 1818, MS. Misc. Let.

In reply to a letter from Mr. Adams, of March 2, 1918, 17 MS. Dom. Let. 128. Cited from Moore, *op. cit.*, vol. IV, pp. 654-655.

THE VON IGEL CASE (QUESTION OF SEIZURE OF PAPERS OF AN ATTACHÉ OUTSIDE THE EMBASSY).

"The von Igel case raises certain interesting questions of diplomatic privilege, the facts publicly reported being as follows:

"In April last Herr Wolf von Igel, former secretary of Captain von Papen, was arrested in his New York office and his papers seized. These were said to contain evidence of their owner's complicity in conspiracies against the neutrality of the United States, along with the revelation of others implicated with him. Copies were made of some or all of these. Against this action Count Bernstorff protested, claiming von Igel to be an attaché of the German Embassy and the papers therefore Embassy documents privileged from seizure.

"The Department of State replied that the actions complained of were committed before von Igel became connected with the German Embassy. As to the papers, von Bernstorff was asked to identify what belonged to the Embassy. This request was thought to be an embarrassing one, since copies were kept and responsibility for unfriendly acts might thus be held to be confessed. The request was refused.

"Assuming that the facts are correctly stated, the questions at issue appear to be:

"1. Does subsequent connection with a foreign embassy or legation wipe out the liability for acts previously committed?

"2. May a foreign diplomatic agent claim at will any papers as belonging to his Government without identification and proof?

"3. In the case cited above, if the papers were surrendered, could copies be properly kept?

"4. Is there any law paramount to the right of diplomatic immunity?

"Taking up these questions *seriatim*, we remark that from the moment that von Igel was certified to as a member of the German Embassy staff, his immunities became operative and his papers became inviolable. All this is a question of record. The object of this immunity is to add to his serviceability, not to screen him from the consequences of illegal acts. It is inconceivable that a man should be taken into the service of an embassy in order to screen him. Prior offences must have been unknown to the head of the embassy, else he would not have been appointed. Otherwise scandal results. The reputation of an embassy demands that its members observe the law. The presumption, therefore, seems to me strong, not only that prior offences are not wiped out by reason of a subsequent diplomatic character, but also that the embassy to which such an offender is attached must desire to purge itself, and must insist upon their trial, if necessary, their punishment.

"But with papers it may be different. They may truly relate to the work of the embassy and be in no wise charged with their custodian's earlier doings. It is therefore just to allow the embassy head to say what their character is. To take copies of them negatives their inviolability.

"Moreover, and here we come to our second query, no one else can determine their character. No one else is in a position to know it. You have got to trust your resident minister altogether, or not at all and have him recalled. If he is plotting against you, there is your right of self-defense, of course, but espionage or knowledge of his secrets by judicial process should not be necessary to self-defense; they are not consistent with real immunity. Nor is it immunity to surrender papers of which copies are kept. It is not the substance of the papers, but the knowledge derived from them which counts. Real immunity demands that you shall not know what they import. In default of actual precedents, then, I should incline to think in the case in point that von Igel could properly be arrested and tried for offences charged to have been committed before his diplomatic character attached; that if von Bernstorff claimed von Igel's papers as embassy documents, they ought to have been held inviolable and that no copies of them should be retained.

"The right of a State to defend itself has been alluded to. Here we have precedents; here we are on firmer ground. If any member of an embassy, resident in a State, plots against it, attempts to injure its integrity, its neutrality, its vital interests, its rights are superior to his rights, and he may be arrested and sent out of the country. Even then, however, he is not under the jurisdiction of his place of residence. The right of self-defense in the State exists for protection, not for punishment; that is left to his own government."

INSTANCES OF VIOLATION OF DIPLOMATIC PRIVILEGES IN THE CASE OF SERVANTS.

"October 30, 1825, Baron Maltitz, secretary of the Russian legation at Washington, called at the Department of State and complained of a violation of his diplomatic privileges by a constable of Georgetown, who attempted to enter his dwelling for the purpose of executing a warrant against one of his domestics named John Moore. Mr. Clay at once wrote to the marshal of the District of Columbia, and requested him to see the mayor of Georgetown, and the constable, if necessary, and prevent any further proceedings to enforce the warrant till the circumstances of the case could be ascertained and the question determined whether the case was 'one falling within the ordinary administration of justice or to which diplomatic privileges appertain.' It subsequently transpired that Moore was charged with assaulting and beating another person, and Baron Maltitz agreed that he might surrender himself to the marshal of the District, who was to deliver him to the mayor of Georgetown to be dealt with according to law."

Moore, *op. cit.*, vol. IV, p. 656.

"In answer to the question proposed in your letter of this day to the Secretary, whether you can with propriety serve a writ upon William McGinty, the coachman of the minister from the Netherlands, for an assault and battery stated to have been committed upon the person of a constable of this city, while in the exercise of the duties of his office, antecedent to the period of the said coachman's entering into the service in which he is now engaged, I have the honor to state, by the Secretary's directions, that the writ may be served elsewhere than on the premises of the minister, which must on no account be entered for that purpose, or at any time and place other than that in which the coachman may be employed in the service of the minister."

Mr. Brent, chief clerk, to Mr. Ringgold, U. S. marshal, Dec. 10, 1825, 21 MS. Dom. Let. 210. Cited from Moore, *op. cit.*, vol. IV, p. 656.

"In June, 1860, Mr. Cass unofficially informed Mr. Zegarra, the Peruvian minister, that the attorney for the District of Columbia had represented that a person named John Smith, alleged to be a coachman in Mr. Zegarra's service, had been charged with the offence of assault and battery during the recent election in Washington. Mr. Cass added that, as it was desirable that the charge should be judicially investigated, he would thank Mr. Zegarra to discharge Smith, for a time at least, in order that justice might have its course. Mr. Zegarra replied that he had given orders that Smith be at once dismissed from his service, in order that justice might be done."

Moore, *op. cit.*, vol. IV, p. 660.

"A servant of French nationality in the employ of the Spanish ambassador in Berlin was charged with assaulting another servant,

who was a German. So long as the Frenchman remained in the ambassador's service, it was held that he was not subject to German jurisdiction, and no proceedings were taken against him. On his discharge from the ambassador's service, however, he was arrested and brought before a local court, and the proper proceedings were taken for his punishment."

Moore, *op. cit.*, vol. IV, p. 662.

CASES OF WESSELS AND VAN BERCKEL.

"December 18, 1787, Mr. Van Berckel, minister of the Netherlands, complained to Mr. Jay, the Secretary of Foreign Affairs, that his privileges as a diplomatic representative had been violated by one John Wessels, a constable, who entered his dwelling at New York and endeavored to arrest and carry away one of his domestics, and who, although finally obliged to desist, acted in a violent manner and used abusive and insolent expressions. Mr. Van Berckel complained of the action of the constable as 'a most atrocious injury' and 'a most notorious and direct violation of the rights of nations.'

"Mr. Jay communicated Mr. Van Berckel's letter to Mr. Duane, mayor of the city of New York, with the statement that the aggression of which Mr. Van Berckel complained was not the first of the kind which that minister had experienced during his residence in the United States, and asked that proper measures might be taken to satisfy the minister and prevent the like improprieties in the future.

"Wessels was subsequently indicted in the court of general sessions of the peace for an unlawful attempt to arrest the domestic in question and with breaking and entering the dwelling house of the Dutch minister, in violation of the latter's privileges and 'contrary to the laws of nations and the laws of the state aforesaid [New York], and against the peace of the people of the state of New York and their dignity.' At that time there was no statute, either of Congress or of New York, respecting a breach of the privileges of ambassadors, and the indictment was found under the common law.

"Wessels, on being arraigned, pleaded not guilty, but he subsequently withdrew this plea and substituted a plea of guilty and invoked the mercy of the court. He was sentenced to be imprisoned for three months."

Dip. Cor. 1783-1789, III, 443-453. Cited from Moore, *op. cit.*, vol. IV, pp. 652-653.

"On June 25, 1792, Mr. Van Berckel again complained of the entry of his house by an officer for the purpose of serving process on one of his servants. The Attorney-General advised that, by secs. 25 and 26 of the act of Congress of 1790, the arrest of the domestic of a public minister was illegal, although if the domestic was an inhabitant of the

United States and had contracted debts prior to entering the service of the minister he was not entitled to the benefit of the act in respect of them. The Attorney-General at the same time called attention to the fact that no one could be proceeded against for such an arrest unless the name of the domestic was registered in the office of the Secretary of State and transmitted to the marshal of the district in which Congress sat. The Attorney-General further advised that, if the arrest should be found to be lawful, yet the entry into the minister's house and executing a process would probably sustain a prosecution.

Randolph, At. Gen., June 26, 1792, 1 Op. 26. Cited from Moore, *op. cit.*, vol. IV, p. 653.

"These immunities attach, no matter whether the house is the property of the agent's government, or his own, or is merely rented by him. If he occupies a flat, presumably the common staircase is not privileged.

"No officer of the State, and in particular no police officer, tax collector or officer of a court of law, can make his way into the house, nor, without the consent of the diplomatic agent, discharge any official function therein. The inviolability of the house also extends to the carriage of the diplomatic agent."

Satow, *op. cit.*, vol. 1, p. 282.

"The immunity of the agent's dwelling extends also to those of his official staff.

CASE OF APODACA'S SERVANT.

"In December 1808, Admiral Apodaca, diplomatic representative of the Supreme Junta of Seville, had occasion to complain to Canning that one of his Spanish servants had been arrested by a constable of the Mary-le-bone parish force, who got into the house by the kitchen door, while another waited outside in the street. He had remonstrated with them for this violation of diplomatic privilege, but they replied (naturally enough) that they could only be guided by the warrant. Apodaca sent a secretary to the Foreign Office, but he was not able to find either Canning or Hammond, the under secretary, which rendered it necessary for him to address a Note to Canning. In the meantime, the officers of justice consented to leave the servant in the house, a neighbour having gone bail for him. Apodaca declared that he had no objection to the servant being tried and convicted if he were guilty (it was on a charge of bastardy that the arrest had been attempted), but he protested against the violation of his diplomatic privilege, in arresting one of his servants in his house without previous notice. Under these circumstances, in order to avoid all dispute and to preserve his rights, he begged Canning in a friendly manner to advise him how to proceed.

"The case was referred to the Chief Magistrate at Bow Street, who reported that the arrest did not take place upon any civil process, but on a charge of bastardy, and he doubted very much whether the arrest of an ambassador's servant under such circumstances constituted a breach of an ambassador's privilege. He admitted that very little was to be found in the books, except where the arrest had been upon civil process, and he quoted Coke's Institutes, fol. 153, where it said: 'If an Ambassador committeth any crime which is *contra jus gentium*, as Treason, Felony, Adultery, or any other crime which is against the Law of Nations, he loseth the Dignity and Privilege of an Ambassador and may be punished here as any other private alien, and need not be remanded back to his sovereign, but of Curtesy.' The constable who executed the warrant had been questioned and was found to be ignorant whether the magistrate who granted the warrant was acquainted with the circumstance of the man complained against being an ambassador's servant.

"No reply from the Foreign Office to Apodaca's Note of December 22 has been found at the Public Record Office, but in his report to the Spanish Government he stated that the servant had been released and that he had declared himself satisfied.

"It seems probable that the magistrate's explanation was communicated to him verbally and that some sort of apology was made for the entry into his house without permission."

Satow, *op. cit.*, vol. 1, pp. 283-284.

THE CASE OF GALLATIN'S COACHMAN (ARREST IN THE STABLE OF THE BRITISH EMBASSY).

"During Mr. Gallatin's mission at London, in 1827, an incident occurred involving a question of diplomatic privileges, which led to an exposition of the British views on the rights of embassy. His coachman was arrested in his stable on a charge of assault, on a warrant from a magistrate. The subject having been informally brought to the notice of the Foreign Office, a communication was addressed to the secretary of the American Legation by the Under Secretary of State, Mr. Backhouse, May 18, 1827, in which he informed Mr. Lawrence of the result of a reference made, by order of Lord Dudley, to the law officers of the Crown. In it it is said that 'the statute of the 7th Anne, chap. 12, has been considered in all but the penal parts of it nothing more than a declaration of the law of nations; and it is held that neither that law, nor any construction that can properly be put upon the statute, extends to protect the mere servants of ambassadors from arrest upon criminal charges, although the ambassador himself, and probably those who may be named in his mission are, by the best opinions, though not by the uniform practice of this country,

exempt from every sort of prosecution, criminal and civil. His lordship will take care that the magistrates are apprised, through the proper channel, of the disapprobation of His Majesty's Government of the mode in which the warrant was executed in the present instance, and are further informed of the expectation of His Majesty's Government that, whenever the servant of a foreign minister is charged with a misdemeanor, the magistrate shall take proper measures for apprising the minister, either by personal communication with him or through the Foreign Office, of the fact of a warrant being issued, before any attempt is made to execute it, in order that the minister's convenience may be consulted as to the time and manner in which such warrant shall be put in execution.

"An official character was given to the preceding communication by a note from Earl Dudley, Secretary of State for Foreign Affairs, June 2, 1827; in which he says that it is only necessary for him to 'confirm the statement contained in the private note of Mr. Backhouse, referred to by Mr. Gallatin, as to the law and practice of this country upon the questions of privilege arising out of the arrest of Mr. Gallatin's coachman, and to supply an omission in that statement, with respect to the question of the supposed inviolability of the premises occupied by a foreign minister. He is not aware of any instance, since the abolition of sanctuary in England, where it has been held that the premises occupied by an ambassador are entitled to such a privilege by the law of nations.'

"He adds that courtesy requires that their houses should not be entered without permission being first solicited in cases where no urgent necessity presses for the immediate capture of an offender."

Stowell and Munro, *Int. Cases*, vol. 1, pp. 7-8.

"But who is to punish dependents of a foreign minister for crimes, and for offences against the local laws? May the minister himself try, and punish them? Or may his state organise a tribunal, in a foreign country, for that purpose, as was done by Edward I in passing through France? Or may the minister arrest and send them home for that purpose? Or should he discharge them from his service and deliver, them up for trial, under the laws of the state where he resides? These are important questions, upon which there has been some diversity of opinion and practice. In 1603 a man named Combaud, one of the retinue of the Duc de Sully, the French ambassador in London, killed an Englishman at a brothel. Sully tried the offender by a council of Frenchmen, and condemned him to death, after which he delivered him over to the English authorities for execution. But James I pardoned the culprit. The French, however, contended (and, we think, correctly), that, although King James might refuse to carry the sentence into execution, or might remit the

execution *in England*, yet, as Combaut was a Frenchman, tried and condemned by a French tribunal, the English king had no power to grant him a pardon. The right of the French authorities to try and condemn in England seems not to have been questioned. Hotman mentions two cases of the exercise of this power by ambassadors, but does not approve it. One was that of the Spanish ambassador at Venice, who hung one of his servants from the window of his own hotel. The other was that of a French ambassador in England, during the reign of Elizabeth, who executed one of his servants for committing a rape upon a female of his family. In 1657, one of the servants of M. de Thou, the French ambassador in Holland, attempted violence upon a woman in La Haye. He was arrested by a patrol, and taken to the guardhouse. The ambassador demanded his release, which was acceded to immediately, and the minister himself inflicted punishment upon the culprit. In October 1896 Sun-Yat-Sen, a Chinese, who was sought for by the authorities of his own country, came to London. There he was enticed into the Chinese Embassy, and detained in it against his will. He managed to write a letter, saying his life was in danger, and dropped it to a passer-by, who carried it to the police. The latter did not venture to enter the embassy by force, but the friends of the detained person presented the matter to the Foreign Office. Lord Salisbury, then Foreign Secretary, ordered the release of the Chinaman, by force if necessary. This he did, not by virtue of any municipal or international law, or by virtue of any treaty, but as a supreme act of state demanded by the emergency.

The Roman ambassadors punished their own dependents, because they were slaves. The earlier writers on international law conceded the same right to modern ambassadors, over the members of their own family and their servants, at least to the extent of irons, imprisonment, and any corporal punishment, short of taking life. Some even contended for their right to punish with death, where that penalty would be imposed by the laws of the minister's own state. But more recent publicists are of opinion that the minister can not himself try or punish criminal offenses, and that his own government can not be permitted to organize a tribunal for that purpose in a foreign state. The minister's house and suite are, for the necessary purposes of his mission, to be regarded as without the territory of the state, but judicial proceedings, and the local punishment of crime, are not in these modern days the necessary appendages of diplomacy. But may not the minister arrest any member of his suite, and send him home for trial and punishment; and if so, does this power include the sending away subjects of the state in which the minister resides? Where citizens of the state enter the service of a foreign minister, they are to be regarded as emigrants from their own, and as domiciled

in a foreign country, and consequently as beyond the jurisdiction and protection of their own government. With respect to the general right to arrest and send home, there seems to be no objection, if no public violence be used. But the minister may have no force of his own for this purpose, nor can he require the foreign State to assist him. Moreover, if the criminal is sent to another country for trial, much difficulty would generally result in procuring the attendance of witnesses, and in proving the offense or crime, even where jurisdiction could be taken of the case of crime committed within another state. It, therefore, seems to be the preferable mode, as a general rule, where a servant, *attaché*, or minister violates the laws of the state in which he resides, for his government to deliver him for trial and punishment by the laws which he has violated. There are, of course, exceptional cases, where a minister would be justified in refusing to make a surrender, and in demanding any such person from the local authorities, but it can not be too strongly insisted that a minister is responsible for the conduct of his dependents, and if he neglect to provide for their punishment under the laws of his own country, or to dismiss them from his service, and deliver them up to the local tribunals, he is necessarily regarded as either the instigator or defender of the offenses or crimes which they commit. Such a course of conduct, on his part, might constitute a sufficient cause for his dismissal. It was on this ground that the President of the United States, in 1856, revoked the *exequatur* of the British consul at New York. It was not alleged that the consul had himself been guilty of engaging in the enlistment of British troops within the limits of the United States, but that the offense had been committed by his secretary, with his knowledge, and even in his presence, and that he had neither punished nor dismissed his subordinate, nor had he even disavowed the acts of that subordinate. But, as already stated, the secretary of legation, and other functionaries of embassy, are sometimes, in a measure, independent of the minister, and have the right of *inviolability* due to representatives of their own state. In such cases, the minister can neither dismiss them from the legation, nor can he divest them of their diplomatic immunity, so as to render them justifiable by the local tribunals. The government against which the offense is committed must, therefore, seek its redress from the State by which such diplomatic agents are appointed, and which is to be held responsible for their good conduct."

Halleck, *op. cit.*, vol. 1, pp. 376-379.

"The privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England. And the act of Parliament of 7 Ann. c. 12 did not intend to alter, nor can alter, the law of nations. His lordship recited the history

of that act and the occasion of it, and referred to the annals of that time. He said there is not one of the provisions in that act which is not warranted by the law of nations. . . .

"The law of nations, though it is liberal, yet does not give protections to screen persons who are not *bona fide* servants to public ministers, but only make use of that pretence in order to prevent their being liable to pay their just debts.

"The law of nations does not take in consuls, or agents of commerce; though received as such by the courts to which they are employed. This was determined in *Barbuit's Case* in Canc. which was solemnly argued before and determined by Lord Talbot on considering and well weighing Barbeyrac, Bynkershoek, Grotius, Wicquefort, and all the foreign authorities (for there is little said by our own writers on this subject). In that case several curious questions were debated.

"If I did not think there was enough in the present case, already appearing to the court, to enable us to form an opinion, I should desire to know in what manner this minister was accredited. Certainly he is not an ambassador, which is the first rank. Envoy, indeed, is a second class; but he is not shown to be even an envoy. He is called 'minister,' 'tis true, but minister (alone) is an equivocal term.

"I find this is not an application by the attorney general by the direction and at the expense of the Crown. That, indeed, would have shown that the Crown thought this person entitled to the character of a public minister. It now remains uncertain what his proper character is.

"But supposing him to be a minister of such a kind as entitles him to privilege; yet I think this is not a case of privilege by the law of nations, for the defendant does not appear to have been in the service of the minister at the time of the arrest.

"A public minister shall not take a man from the custody of the law, though the process of the law shall not take his menial servant out of his service.

"Here it is not sworn when the defendant came into the service. And upon the manner of swearing here used, the court must take it 'that he was not in the minister's service at the time of the arrest.'"

Lord Mansfield in *Heathfield v. Chilton*, Court of Queen's Bench, 1767, 4 *Burrow*, 2015, and Scott, *Cases*, 190-191.

CASES OF COLORABLE SERVICE—PARKINSON V. PATTEN.

"The evidence that Senhor Pinto de Basto is an attaché to the Portuguese legation is slight, but I think there is evidence of the fact. It seems that he is known at the embassy as an attaché, and is there spoken to and spoken of as an attaché, and treated as an attaché. It seems that there is no salary attached to the post, but that the

government of his country can exact from him certain small services; and that he has in fact been employed by the minister occasionally to write letters and to take messages, and to help in the translation of documents connected with the diplomatic work of the embassy, and that he goes often to the embassy and places himself at the disposal of the ambassador. . . .

“An attaché is a well-known term in the diplomatic service. He forms part of the regular suite of an ambassador. He is classed by Calvo, the author of an elaborate French work on international law, published in 1880, and written with admirable clearness and with a copiousness of historical illustration which makes his treatise most interesting as well as instructive, along with ‘*Conseillers et Secrétaires*,’ and he gives a common description of the functions of all three classes of officers as consisting in supporting the minister in all things, in preparing and forwarding official despatches, in carrying out communications by word of mouth with the public administrative authorities of the country to which the minister is accredited, in classifying and keeping charge of the archives of the mission, in ciphering and deciphering despatches, in making minutes of the letters which the minister may have to write, and similar services; and he treats the attaché as undoubtedly entitled to all the immunities accorded to the suite of an ambassador: Calvo, *International Law*, vol. 1, p. 486.

“One of these immunities, insisted upon by all writers on international law with whose works I have any acquaintance, as beyond question, is the complete exemption from the jurisdiction of the courts of the country to which the minister is accredited. They are all, so far as I have been able to ascertain, equally clear in the opinion that the exemption extends to the family and suite of the ambassador. ‘This immunity,’ says Wheaton, ‘extends not only to the person of the minister but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides’: *International Law*, Ed. 1863, p. 394. Again, ‘the wife and family, servants, and suite of the minister participate in the inviolability attached to his public character’: *Ibid*, 397. For these propositions he quotes Grotius, Bynkershoek, Vattel, and Martens, and he treats these privileges as essential to the dignity of his sovereign and to the duties he is bound to perform. Martens says, ‘The exemption from civil jurisdiction, contentious and voluntary alike, is general, and belongs to ministers throughout the whole extent of the country in which they reside. They enjoy it for themselves, for their suite, and for their effects, in as far, be it always understood, as they do not travel out of their diplomatic character’: *Guide Diplomatique*, Vol. I, p. 81. To the same effect is the statement by Calvo: ‘The staff of the mission, the wife and family of

the diplomatic agent, participate in these prerogatives,' and amongst the prerogatives there enumerated is that 'he is exempt from the local jurisdiction of the country into which he is sent; no legal process can be brought against him before the tribunals of the place of his residence': Vol. I, p. 381. 'The person who enjoys extritoriality,' says the German Bluntschli, 'can not be subjected to any impost': *International Law Codified*, art. 138. 'The family, the staff, the suite, and the servants of him who has the right of extritoriality,' says the same writer, 'enjoy the same immunity as himself. His suite have the right but indirectly and on account of him to whom they are attached': Art. 145. 'Such persons are exempt from jurisdiction': Art. 147. 'The immunity of the person exempted extends to the members of his suite': Heffter, *International Law of Europe*, sec. 42, VI. These are amongst the most recent French and German authorities upon the subject, and are for the most part subsequent to those cited in the elaborate arguments in *Taylor v. Best*, 14 C. B. 487, and *Magdalena Steam Navigation Co. v. Martin*, 2 E. & E. 94; and, so far as I have been able to ascertain, no writer on international law appears to entertain any doubt upon this point.

"It was urged for the defendant that there are English authorities conflicting with these propositions. I do not think it is so, if they are carefully considered. It was said that in *Fisher v. Begrez*, 1 C. & M., 117, it was held that the goods of a chorister to the Bavarian embassy were not privileged from execution under a *fi. fa.*; but in that case the sheriff had not executed the *fi. fa.*, nor was the protection of the court claimed by the ambassador or his servant. The sheriff claimed to be exempt from the duty of levying. The defendant had allowed himself to be sued and the action to proceed to judgment and execution without claiming the privilege, and the sheriff applied to the court upon affidavits which were quite insufficient to show, and failed to satisfy the court, that there was any foundation for the allegation that the defendant was then in the service of the Bavarian minister.

"In *Novello v. Toogood*, 1 B. & C., 554, it was held that the goods of a chorister in the service of the Portuguese ambassador were not privileged from distress for poor rates. But in that case the servant was carrying on the business of a lodging-house keeper in the house in question. Most writers on international law say that with regard to an ambassador even, although he does not lose his privileges as an ambassador by engaging in trade in the country to which he is accredited, yet the immunity of his goods does not extend to protect his stock in trade. The *ratio decidendi* in *Novello v. Toogood*, *supra*, is that the plaintiff Novello, who claimed exemption from poor rate, was carrying on the business of a lodging-house keeper in the house in question.

"An exception from the privilege of being exempt from jurisdiction it, by the statute of 7 Ann., c. 12, sec. 5, specifically applied to the case of an ambassador's servant carrying on a trade; and in *Novello v. Toogood*, *supra*, Abbott, C. J., so far from hinting a doubt as to the general principle that the immunity from process extends to the servant of the ambassador, observes, 'I do not say that he may not have a house fit and convenient for his situation as the servant of an ambassador, nor that the furniture in such a house will not be privileged.' It may be added that Novello was a British-born subject, and that most writers on international law are of opinion that a subject of the country in which the ambassador is resident remains subject to the law of his country, and that in respect of him the immunity which would be afforded to a foreigner can not be claimed. *Portier v. Croza*, 1 Wm. Bl., 48, was cited, but in that case the court was convinced that the alleged service was a sham.

"Reliance was placed on *Taylor v. Best*, 14 C. B. 487, 490. But the substance of the decision in that case was that, where the ambassador had voluntarily appeared as one of several defendants, and defended the action up to judgment, he had waived his privilege, and it was too late for him to apply to have all further proceedings stayed or to have his own name struck out of the record. It is true that Maule, J., expressed doubts as to whether an ambassador in England could claim a complete immunity from all English process. But that doubt was removed and pronounced to be ill-founded in the considered and elaborate judgment of the court of Queen's Bench in *Magdalena Steam Navigation Co. v. Martin*, 2 E. & E. 94, in which it was held that the minister of a foreign country can not be sued against his will in this country, although the action may arise out of commercial transactions carried on by him here. There is, therefore, nothing in the current of English authorities to contravene the doctrine of exemption from process—a part of the privileges which constitute the 'extritoriality' of foreign jurists—as laid down by the writers on international law; and there is nothing in the circumstances of this case to prevent its application to Senhor de Basto. He is not carrying on trade nor letting lodgings; and the house in question is simply the private residence of himself and his family; and I am of opinion that he was not liable to pay the rates assessed upon him in respect of his occupation.

"It follows that under s. 190 of the local act the plaintiff, as the landlord of his house, was liable to pay them, and, having paid them, it is clear that, under the covenant sued upon, the defendant is bound to recoup him. The judgment of the county court judge was right, therefore, and the appeal must be dismissed with costs."

Scott, Cases, pp. 192-96, J. Willis in *Parkinson v. Potter*.

OTHER CASES.

"In *Macartney v. Garbutt*, 1890, 24 Q. B. D. 368, it was held that this immunity extended to a diplomatic agent, although a subject of the receiving county, unless the immunity were specifically limited before receiving such agent.

"Where, however, a British subject in debt was appointed honorary attaché of the Persian embassy for the purpose of escaping bankruptcy, diplomatic immunity from suit was disallowed. (*In Re Cloete*, 1891, 65 L. T. 102, 7 Times R., 565.)

"In other words, for the immunity to attach, the claimant must be actually and *bona fide* in the diplomatic service, either as agent or servant; if the claim be colorable merely, it will be rejected. On this point the authorities are numerous and unanimous: *Lockwood v. Dr. Coysgarne*, 1765, 3 Burr., 1676; *Fisher v. Begrez*, 1832, 1 C. & M., 117; same case, 2 C. & M., 240, and cases cited in argument of case as reported in 1 C. & M. While the diplomatic agent may waive immunity of his servant, he can not in the United States waive his own immunity, as this is the privilege of his state, not a personal privilege. (*U. S. v. Benner*, 1830, Bald., 234.)

"In *Guiteau's Trial* (1881), 1 Wharton's Digest, 669, Señor Camacho, minister from Venezuela, who was present at President Garfield's assassination, was called as a witness for the prosecution.

"Before he was sworn the following statement was made by the district attorney:

"'If your honor please, before the gentleman is sworn, I desire to state, or rather I think it due to the witness to state, that he is the minister from Venezuela to this government, and entitled under the law governing diplomatic relations to be relieved from service by subpoena or sworn as a witness in any case.

"'Under the instructions of his government, owing to the friendship of that government for the United States, and the great respect for the memory of the man who was assassinated, they have instructed him to waive his rights and appear as a witness in the case, the same as any witness who is a citizen of this country.'"

Respublica v. De Longchamps, 1 Dallas, 110 (1784).—The defendant threatened to assault the Secretary of the French Legation, the threats being made in the house of the French minister. The defendant was fined \$500 and imprisoned two years.

"*United States v. Liddle*, 2 Wash. Circ. Ct. 205 (1808).—Indictment for assault and battery on a member of the Spanish Legation. The law is the same whether the attacked is a private party or an ambassador, viz, if the ambassador was the prior assaulting party, the defendant is excused for his subsequent assault.

"The law of nations identifies the property of the foreign minister, attached to his person or in his use, with his person. To insult them is an attack on the minister, and his sovereign; but to constitute an offense against a foreign minister, the defendant must have known that the house attacked was the domicile of a minister, for otherwise it is only an offense against the municipal law of the State. *U. S. v. Hand*, 1810, 2 Wash. C. C. 435.

"*United States v. Ortega*, 4 Wash. Circ. Ct. 531 (1825).—Indictment for assault on the Spanish Chargé d'Affaires. Cites Liddle's case and affirms it: 'A foreign minister, by committing the first assault, so far loses his privilege, that he can not complain of an infraction of the law of nations; if, in his turn, he should be assaulted by the party aggrieved.'"

Scott's Note in *Cases*, pp. 196–197.

"There is a considerable diversity both in the doctrine and practice respecting immunities of domestics or nonofficial members of the diplomatic suite. The Italian school of publicists deny immunity from all criminal as well as civil jurisdiction. Others make a distinction between these two kinds of jurisdiction. Some authorities distinguish between offenses committed outside and inside the embassy; others between nationals and foreigners.

"Anglo-American law and practice, which grant immunity from suit to domestics of public ministers, seem more liberal than necessary, for the modern tendency is to restrict the diplomatic privileges and immunities of mere servants or non-official members of the legation, and this tendency is in the right direction. These extensive immunities are no longer necessary (if, indeed, they ever were) to the freedom of the diplomatic agent. At any rate, there appears to be no good reason why domestics should enjoy immunity from civil jurisdiction."

Hershey, *op. cit.*, Note, p. 294.

"The servant need not lie in the house, although he must do some service there. He must be a real, not a nominal servant. Many cases arose upon claims of privilege by persons as servants of the Count Haslang, the Bavarian Ambassador, of whom it was said that, although a minister of a very humble rank, he had more domestics registered than the ambassadors of the most potent Powers in Europe.

"In the case of *Masters v. Manby*, application was made to the Court for the discharge of the defendant, as being the ambassador's messenger, and it was sworn that he *sometimes* executed service as such. The defendant was a land-waiter at the Custom House, and the Court were of opinion that he could never be deemed a *bona-fide*

domestic. In *Triquet v. Bath*, the privilege was allowed to the defendant, as English secretary of the ambassador, the defendant's affidavits being so framed that everything was sworn that in absolute strictness could be required, to bring him within the description of a domestic servant; and the Court held that it was sufficient if an actual *bona-fide* service were proved; and that if such a service were proved, they must not upon bare suspicion, suppose it to have been merely colourable and collusive.

"In *Lockwood v. Coysgarne*, the claim of privilege was disallowed to the defendant as the ambassador's physician, as not being a case of *bona-fide* service; and the Court said, it would be of very bad consequence if protections should be set up for sale, or made use of merely for the sake of screening people from their just debts. In *Danling v. Atkins* the privilege was disallowed to the ambassador's English secretary, he being purser of man-of-war, which was held to be an office incompatible with the situation of secretary to the ambassador. In this case it was observed, that the ambassador's secretary is privileged, the statute being only explanatory of the Law of Nations, and the words 'domestic' and 'domestic servant' are only by way of example. 'The statute only requires the names of the persons privileged to be registered, for the purpose of proceeding against the parties criminally, for a violation of the Act, and not for the purpose of exemption from arrest.'

"In a later case it was decided that though a foreign minister does not lose his privilege of exemption of suit by trading in this country, his domestic servants do, under the limitation contained in the statute on which we have been commenting."

Phillimore, *op. cit.*, vol. II, 228-230.

COURIERS AND MESSENGERS.

"Persons carrying official despatches to or from diplomatic agents have the same rights of inviolability and innocent passage that belong to the diplomatic agent himself, provided that their official character be properly authenticated. It is usual to provide this authentication in the form of special passports, stating in precise terms the errand upon which they are engaged."

Hall, *op. cit.*, p. 325.

"The practice of nations has also extended the inviolability of public ministers to the messengers and couriers, sent with despatches to or from the legations established in different countries. They are exempt from every species of visitation and search, in passing through the territories of those powers with whom their own Government is in amity. For the purpose of giving effect to this exemption,

they must be provided with passports from their own Government, attesting their official character; and, in the case of despatches sent by sea, the vessel or *aviso* must also be provided with a commission or pass. In time of war, a special arrangement, by means of a cartel or flag of truce, furnished with passports, not only from their own Government, but from its enemy, is necessary, for the purpose of securing these despatch vessels from interruption, as between the belligerent powers. But an ambassador, or other public minister, resident in a neutral country for the purpose of preserving the relations of peace and amity between the neutral State and his own Government, has a right freely to send his despatches in a neutral vessel, which can not lawfully be interrupted by the cruisers of a power at war with his own country."

Wheaton, *Int. Law*, p. 320.

THE CASE OF COLONEL FARRAND.

"The question which arose between General Hovey and the minister for foreign affairs of Peru, relative to the right of that government to obstruct the departure of Colonel Farrand, who had been appointed a bearer of dispatches by the general, seems to be of too much general importance to be left unnoticed by this Department. It is of no moment in the particular case, as the Peruvian government ultimately connived at Colonel Farrand's departure.

"The occasion for the colonel's employment in the character adverted to was the conclusion of two treaties between the United States and Peru, which were signed on the 6th and 12th of last month. General Hovey's instructions recognized his right to make such an appointment in such a contingency. The appointment was made accordingly on the 12th of September, and Colonel Farrand's passport in his official character issued to him on that day without any information to General Hovey that any branch of the Peruvian government or any person objected to the colonel's discharging the duties of his trust. It seems, however, that subsequently, but before the colonel could start on his errand, a person claiming to be a creditor of his sued out judicial process forbidding him to leave Peru. Gen. Hovey promptly complained of this proceeding as contrary to international law relative to the immunities of couriers, as set forth in Wheaton's treaties on that subject. The minister, in his reply, while acknowledging the authority of Wheaton, endeavors to restrict the privilege of couriers as there declared to those appointed by a government to its legations abroad, and enlarges upon the inconveniences which the more extensive enjoyment of such immunities would lead to. It is true that no abuse of the privilege in this case is alleged, but its existence is impliedly, at least, denied. This denial, however, has

no support from Wheaton, or from any other writer on that branch of public law. If the Peruvian minister supposed that he had any reason to hesitate in acknowledging the unqualified character of the rule laid down by Wheaton, the plain and unequivocal terms in which Calvo speaks upon this point may be enough to remove any such hesitation. The work of this author on international law was published in Spanish at Paris, in 1868. It is remarkable as embracing everything illustrative of the subject up to the time of its publication, and its clearness and precision are at least equal to its fullness. At paragraph 240, on page 350 of the first volume, may be found the words of which the following is a translation:

“The inviolability which public ministers enjoy has also been extended to the messengers and couriers of the embassies and to those who proceed to them with official dispatches, and as a general rule to all who discharge, as cases may arise, any commission for those embassies.”

“This, it seems, should be conclusive of the question. If General Hovey had been aware that Colonel Farrand was justly liable to arrest, and had willfully appointed him a bearer of dispatches to screen him therefrom, this would have been sufficient cause of complaint on the part of the Peruvian government, and perhaps of censure of its minister by this government. Even this knowledge on the part of the general, however, would not, it is conceived, have impaired the immunity of his courier under the public law. If alleged delinquencies or pretended claims are trumped up against persons appointed or about to be appointed couriers in foreign countries to prevent them from starting, the immunity guaranteed to them by public law may at any time be annihilated by an envious or malicious person. This is a result to be deplored and guarded against by all governments, by the government of Peru as well as by the government of the United States.”

Mr. Fish, Sec. of State, to Mr. Brent, Oct. 19, 1870, For. Rel. 1870-519.
Cited from Moore, *op. cit.*, vol. IV, pp. 714-716.

“The publicists, whose writings are within reach of this Department, mention no such qualification of the right of employing a courier [viz., that the immunities of a courier from a legation do not attach to a person appointed in the country where the legation is situated]. That right is regarded by them as unlimited, or as only subject to the discretion of the legation in the choice of a person for the discharge of the trust. It is a general principle conferred by public law, which, in the interest of all nations, ought not to be restricted by municipal law, but, if necessary or advisable, should be confirmed and facilitated by the latter. It is true that in some countries municipal enactments are necessary to secure to the members of foreign legations those immunities under the law of nations to which

they are entitled. This government became sensible of this early in its career, for so long ago as the 30th of April, 1790, Congress declared void any process sued out of any court in the United States against any foreign minister or any domestic of his, and made this and the serving of such process a penal offense. Although bearers of dispatches are not expressly mentioned in the statute adverted to, as its object was to impart to every member of a foreign legation that immunity to which he may be entitled under the law of nations, no doubt is entertained that, if the statute were violated in respect to any bearer of dispatches duly appointed by the head of a foreign legation in this country, the violators would be punishable under that statute. . . . No appointment in a foreign country of a person as courier under arrest, or liable to arrest, would be approved by this Department, especially if such appointment was in any way intended to screen the appointee from his liabilities under the municipal law."

Mr. Fish, Sec. of State, to Mr. Freyre, Dec. 17, 1870, MS. Notes to Peru.
Moore, *op. cit.*, vol. IV, 715-716.

V. THE FREEDOM OF THE HOTEL OR RESIDENCE.

"Immunities connected with property apply first and foremost to the official residence of the ambassador, usually called his *hotel*. It is generally regarded as inviolable except in cases of great extremity. The fiction of ex-territoriality is sometimes applied to it, and it is held to be a portion of the state to which its occupant belongs. But the theory is a clumsy attempt to account for what is better explained without it. If it were true, the hotel could in no case be entered by the local authorities; whereas it is universally admitted that the extreme circumstances which justify the arrest of a diplomatic minister of a foreign power and the seizure of his papers, justify also forcible entry into his hotel and its search by the officers of the State to which he is sent. But the attack by Chinese troops and Boxers on the foreign embassies at Peking in June and July, 1900, with the connivance of the Chinese Government if not under its direct orders, was an outrage for which no shadow of justification can be pleaded. It was justly followed by stern retribution, and the exaction of pecuniary indemnities. It must, however, be admitted that the excesses of some of the troops sent out by the great civilized powers to be the instruments of avenging justice were as reprehensible as the original offence.

"It is now settled that in European countries ambassadors do not possess a right of giving asylum in their residences to criminals and refugees, though in the eighteenth century they were disposed to claim it. There appears, however, to be a binding custom in favor of harboring political refugees in the South and Central American

states, and in Oriental countries. The frequent revolutions in the former group of states, and the barbarous treatment of political offenders in the latter, are held to justify a departure from the ordinary rule. The reception of Balmacedist refugees by Mr. Egan, the United States minister, in the course of the Chilian revolution of 1891, is a case in point, though there can be little doubt that he attempted to extend the right of asylum further than established usage warranted when he demanded safe-conducts for political refugees sheltered in his abode.

“Some states do not recognize the immunities of the ambassador’s residence as existing to the extent usually claimed. France holds that the privileges of the hotel do not extend to acts done within it affecting the inhabitants of the country in which it is situated. Great Britain claims the right of arresting servants of the embassy within the precincts of the hotel. This was clearly shown by a case that occurred in 1827, when the coachman of Mr. Gallatin, the American minister in London, was arrested in his stable by the local authorities on a charge of assault committed outside the embassy. The attention of the British Foreign Office was called informally to the subject, and in reply it was asserted that the law did not extend “to protect mere servants of ambassadors from arrest upon criminal charges,” and that the premises occupied by a diplomatic minister were not entitled to inviolability. The magistrates who issued the warrant were, however, told that they ought to have informed the minister of what they had done, in order that his convenience might have been consulted as to the time and manner of making the arrest. The attitude of France and Great Britain in this matter is rather an exception to the general practice of states than an example of the enforcement of an ordinary rule. But it must be admitted that the exact limits of the inviolability of the hotel are ill-defined. The ambassador is free from the payment of taxes levied upon it, whether for purposes of state or for the maintenance of municipal government; but if the charge for such commodities as light and water takes the form of local taxation he would be expected to meet the demands for them, just as he is expected to pay the bills for the provisions consumed by his household, though he can not be compelled to do so, since his person is inviolate and his house and goods are exempt from legal process. The other official property of the embassy shares the immunities of the hotel. It may not be seized, distrained upon, or dealt with in any way, except in extreme cases of state necessity.

“Among the privileges covered by the principle of the general inviolability of the official residence of the legation, one of the most important is the celebration of divine worship within it in the form desired by the ambassador, even though it is prescribed by the country in which he resides. But he may not give public notification of

the services by ringing a bell or in any other way, nor may he allow subjects of the country to which he is accredited to be present, if attendance at such worship is forbidden by their law."

Lawrence, *op. cit.*, pp. 316-319.

"It is agreed that the house of a diplomatic agent is so far exempted from the operation of the territorial jurisdiction as is necessary to secure the free exercise of his functions. It is equally agreed that this immunity ceases to hold in those cases in which a government is justified in arresting an ambassador and in searching his papers;—an immunity which exists for the purpose of securing the enjoyment of a privilege comes naturally to an end when a right of disregarding the privilege has arisen. Whether, except in this extreme case, the possibility of embarrassment to the minister is so jealously guarded against as to deprive the local authorities of all right of entry irrespectively of his leave, or whether a right of entry exists whenever the occasion of it is so remote from diplomatic interests as to render it unlikely that they will be endangered, can hardly be looked upon as settled. Most writers regard the permission of the minister as being always required; and Vattel refers to a case which occurred in Russia where two servants of the Swedish ambassador having been arrested in his house for contravening a local law, the Empress felt obliged to atone for the affront by punishing the person who had ordered the arrest, and by addressing an apologetic circular to the members of the diplomatic body. In England however, in the case of Mr. Gallatin's coachman, the government claimed the right of arresting him within the house of the minister, admitting only that as a matter of courtesy notice should be given of the intention to arrest, so that either the culprit might be handed over or that arrangements might be made for his seizure at a time convenient to the minister. In France it has been held by the courts that the privileges of an ambassador's house do not cover acts affecting the inhabitants of the country to which he is accredited; and when in 1867 a Russian subject [named Nikitchenkoff or Mickilchenkoff], not in the employment of the ambassador, attacked and wounded an attaché within the walls of the embassy, the French government refused to surrender the criminal, as much upon the general ground that the fiction of extritoriality could not be stretched to embrace his case, as upon the more special one, which was also taken up, that by calling in the assistance of the police the immunities of the house had been waived, if any in fact existed in the particular instance. It does not appear whether the French government, in denying that the fiction of extritoriality applied to the case in question, intended to imply the assertion of a right to do all acts necessary to give effect to its jurisdiction, and whether

consequently it claimed that it would have had a right to enter the ambassador's house to arrest the criminal, or whether it merely meant that, if the criminal had been kept within the embassy and the ambassador had refused to give him up, a violation of the local jurisdiction would have taken place for which the appropriate remedy would have been a demand addressed to the Russian Government to recall their ambassador and to surrender the accused person. Whether or not, however, the immunities of the house of a diplomatic agent protect it in all cases from entry by the local authorities, and if so whatever may be the most appropriate means for enforcing jurisdiction, it is difficult to resist the belief that there are cases in which the territorial jurisdiction can not be excluded by the immunities of the house. If an assault is committed within an embassy by one or two workmen upon the other, both being in casual employment, and both being subjects of the state to which the mission is accredited, it would be little less than absurd to allow the consequences of a fiction to be pushed so far as to render it even theoretically possible that the culprit, with the witnesses for and against him, should be sent before the courts in another country for a trivial matter in which the interests of that country are not even distantly touched.

"In one class of cases the territorial jurisdiction has asserted itself clearly by a special usage. If the house of a diplomatic agent were really in a legal sense outside the territory of the state in which it is placed, a subject of that state committing a crime within the state territory and taking refuge in the minister's residence could only be claimed as of right by the authorities of his country if the surrender of persons accused of the crime laid to his charge were stipulated for in an extradition treaty. In Europe, however, it has been completely established that the house of a diplomatic agent gives no protection either to ordinary criminals, or to persons accused of crimes against the state. A minister must refuse to harbour applicants for refuge, or if he allows them to enter he must give them up on demand. In Central and Southern America matters are different. It is an instance of how large a margin of indefiniteness runs along the border of diplomatic privilege that the custom of granting asylum to political refugees in the houses of diplomatic and even of consular agents still exists in the Spanish-American Republics. In 1870 the government of the United States suggested, without success, that the chief powers should combine in instructing their agents to refuse asylum for the future, but during the Chilean civil war of 1891 no fewer than eighty refugees were received into the American legation. A large number were given asylum by the ministers of several other states."

"It is generally agreed that the hotel or residence of the foreign minister is protected from forcible entry or invasion by his diplomatic inviolability and immunities. But this freedom is not absolute. The embassy must not harbor criminals or refugees from justice, and no violation of territorial sovereignty should be permitted. The minister should surrender those accused of crime and, if necessary, even permit the premises to be searched. In case of persistent refusal, the legation may be surrounded with guards, and if extremely urgent, forcible entry may be made."

Hershey, *op. cit.*, p. 292.

"The first of these privileges is immunity of domicile, the so-called *Franchise de l'hotel*. The present immunity of domicile has developed from the former condition of things, when the official residences of envoys were in every point considered to be outside the territory of the receiving States, and when this extritoriality was in many cases even extended to the whole quarter of the town in which such a residence was situated. One used then to speak of a *Franchise du quartier* or the *Jus quarteriorum*. And an inference from this *Franchise du quartier* was the so-called right of asylum, envoys claiming the right to grant asylum within the boundaries of their residential quarters to every individual who took refuge there. But already in the seventeenth century most States opposed this *Franchise du quartier*, and it totally disappeared in the eighteenth century, leaving behind, however, the claim of envoys to grant asylum within their official residences. Thus, when in 1726, the Duke of Ripperda, first Minister to Philip V of Spain, who was accused of high treason and had taken refuge in the residence of the English Ambassador in Madrid, was forcibly arrested there by order of the Spanish Government, the British Government complained of this act as a violation of International Law. Twenty-one years later, in 1747, a similar case occurred in Sweden. A merchant named Springer was accused of high treason and took refuge in the house of the English Ambassador at Stockholm. On the refusal of the English envoy to surrender Springer, the Swedish Government surrounded the embassy with troops and ordered the carriage of the envoy, when leaving the embassy, to be followed by mounted soldiers. At last Springer was handed over to the Swedish Government under protest, but England complained and called back her ambassador, as Sweden refused to make the required reparation. As these two examples show, the right of asylum, although claimed and often conceded, was nevertheless not universally recognized. During the nineteenth century all remains of it vanished, and when in 1867 the French envoy in Lima claimed it, the Peruvian Government refused to concede it.

"Nowadays the official residences of envoys are *in a sense and in some respects only* considered as though they were outside the

territory of the receiving States. For the immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys. Therefore, no act of jurisdiction or administration of the receiving Governments can take place within these residences, except by special permission of the envoys. And the stables and carriages of envoys are considered to be parts of their residences. But such immunity of domicile is granted only in so far as it is necessary for the independence and inviolability of envoys and the inviolability of their official documents and archives. If an envoy abuses this immunity, the receiving Government need not bear it passively. There is, therefore, no obligation on the part of the receiving State to grant an envoy the right of affording asylum to criminals or to other individuals not belonging to his suite. Of course, an envoy need not deny entrance to criminals who want to take refuge in the embassy. But he must surrender them to the prosecuting Government at its request, and, if he refuses, any measures may be taken to induce him to do so, apart from such as would involve an attack on his person. Thus, the embassy may be surrounded by soldiers, and eventually the criminal may even forcibly be taken out of the embassy. But such measures of force are justifiable only if the case is an urgent one, and after the envoy has in vain been required to surrender the criminal. Further, if a crime is committed inside the house of an envoy by an individual who does not enjoy personally the privilege of extraterritoriality, the criminal must be surrendered to the local Government. The case of Nikitschenkow, which occurred in Paris in 1867, is an instance thereof. Nikitschenkow, a Russian subject not belonging to the Russian Legation, made an attempt on and wounded a member of that legation within the precincts of the embassy. The French police were called in and arrested the criminal. The Russian Government required his extradition, maintaining that, as the crime was committed inside the Russian Embassy, it fell exclusively under Russian jurisdiction; but the French Government refused extradition and Russia dropped her claim.

“Again, an envoy has no right to seize a subject of his home State who is within the boundaries of the receiving State and keep him under arrest inside the embassy with the intention of bringing him away into the power of his home State. An instance thereof is the case of the Chinaman Sun Yat Sen, which occurred in London in 1896. This was a political refugee from China living in London. He was induced to enter the house of the Chinese Legation and kept under arrest there in order to be conveyed forcibly to China, the Chinese envoy contending that, as the house of the legation was Chinese territory, the English Government had no right to interfere.

But the latter did interfere, and Sun Yat Sen was released after several days.

“As a contrast to this case may be mentioned that of Kalkstein which occurred on the Continent in 1670. Colonel von Kalkstein, a Prussian subject, had fled to Poland for political reasons since he was accused of high treason against the Prussian Government. Now Frederic William, the great Elector of Brandenburg, ordered his diplomatic envoy at Warsaw, the capital of Poland, to obtain possession of the person of Kalkstein. On November 28, 1670, this order was carried out. Falkstein was secretly seized, and, wrapped up in a carpet, was carried across the frontier. He was afterwards executed at Memel.”

Oppenheim, *op. cit.*, vol. I, pp. 461-464.

“The independence of a public minister would be very imperfect, if the house in which he lived, and his personal effects or movables, were not entirely exempt from the local jurisdiction. Otherwise, he might be disturbed under a thousand pretences, his papers searched, his secrets discovered, and his person exposed to insults. Hence, his house is inviolable, and can not be entered without his permission, by police, custom-house, or excise officers, nor can troops be quartered in it. For the same reasons, his coaches and carriages are usually exempt from all local jurisdiction and examination. But the abuse of this privilege, on the part of ministers, by making their houses an asylum for fugitives from justice, and their carriages a means of effecting the escape of guilty persons, has caused it to be very much restrained by the municipal laws of some countries, sanctioned, in some degree, by the tacit consent of other nations. On this subject, Vattel remarks, that ‘an ambassador’s house, being independent of the ordinary jurisdiction, no magistrate, justices of the peace, or other subordinate officers, are in any case to enter it by their own authority, or to send any of their instruments, unless it be on an occasion of pressing necessity, where the public welfare is in danger, and which admits of no delay. Whatever concerns a point of such weight and delicacy; whatever affects the right and glory of a sovereign power; whatever may embroil the state with that power, is to be laid immediately before the sovereign, and regulated by himself, or, on his orders, by his council of state.

“Thus, a sovereign is to determine how far the right of asylum, which an ambassador attributes to his house, is to be regarded; and if the delinquent be such that his detention or punishment is of great importance to the State, the prince is not to be withheld by the consideration of a privilege which was never given for the detriment and ruin of States.’ Thus, when the Duke of Ripparda, in 1726, took shelter in the house of the English ambassador, Lord Harring-

ton, the council of Castile decided that he might be taken out of it, even by force, for, otherwise, what was intended for the benefit of sovereigns would turn to the ruin and destruction of their authority. The Marquis of Fontenay, French ambassador at Rome, sheltered certain Neapolitan exiles and rebels, and attempted to take them out of Rome in his coaches; but the coaches were stopped at the gates and the Neapolitans conveyed to prison. The ambassador sharply complained of this, but the Pope answered him: 'That he had given orders for seizing those whose escape the ambassador had favoured; that since he took the liberty of protecting villains and criminals of all kinds within the ecclesiastical State, he, who was sovereign, should at least be allowed to lay hold of them again, whenever they could be met with, *as the rights and privileges of ambassadors were not to be carried to such a height.*' A criminal at Madrid, in the time of Philip II, escaped from justice and took refuge in the house of the Venetian ambassador. The ambassador and suite resisted the officers of justice, but some of the suite were hanged or flogged by the Spanish government. In 1747, a Swedish merchant, named Springer, accused of high treason, took refuge in the hotel of the English ambassador at Stockholm. The ambassador at first refused to surrender him; but after the Swedish government had surrounded his house with troops, searched everybody who entered it, and caused his carriage, when he left the hotel, to be followed by a guard, he surrendered Springer, under a protest as to the violence done to his ambassadorial privilege. England demanded reparation, but Sweden steadily refused it, and the ambassadors of the two governments were mutually withdrawn. Phillimore, the English author, commenting upon this case, says: 'It seems clear that the conduct of Sweden was in accordance with the principles of international law.'

Halleck, *op. cit.*, vol. I, pp. 280-382.

"If the fiction of extra-territoriality were a fact, the question would admit but of one solution. But, the test being the convenience of nations, no reason is seen why the fact, that an act was done within the hotel, should of itself be a bar to jurisdiction. If a British subject commits an offence within the hotel of the French minister against another British subject, neither having any connection with the mission, and is afterwards arrested in the street, there seems no reason connected with the convenience or dignity of diplomacy why he should not be tried by the British courts, and every reason why he should not be exempt from their jurisdiction, and either *lege solutus*, or amenable only to French laws and procedure. In short, the mere fact that either a contract was made or a wrong done within the hotel, if not involving any privilege of the persons concerned, or of the place of arrest, seems to present no ground for ousting the sovereign of his jurisdiction. . . .

"Neither the opinions of text-writers nor the practice of nations is settled as to this general immunity. The British Government, it has been seen, has claimed the right to enter and make arrests, admitting only the propriety of giving notice. It seems, however, to be the fair result of reasoning on principle and of a comparison of authorities, that the hotel should enjoy (with the exception of the exigency stated) an absolute immunity from the service of compulsory process within its limits. Distinctions between civil and criminal processes, and between citizens and foreigners, and persons connected or not connected with the embassy, are complex and troublesome, and do not solve the difficulty. If the convenience of nations requires that the hotel be free from forcible entry and forcible process, it is best to have a simple and avowed rule. Little practical inconvenience can arise from it. If, on demand, the ambassador refuses to deliver up the person sought, it becomes a diplomatic question between him and the sovereign to whom he is accredited, or between the two nations; and the sovereign has the usual remedy of dismissing the ambassador, and, if that is not enough, of refusing to receive another in his place, or to grant rights of diplomatic hotel, as well as other international remedies. It can hardly be supposed that an ambassador would fail to protect his hotel against being made an asylum for offenders, by having it understood that they would be at once delivered up. This immunity, of the hotel from invasion is, of course, a local immunity and is irrespective of the character or nationality of the person sought to be arrested, the nature of the offence, or place where it was committed. The duty of an ambassador to make delivery of any such person, on demand, is of course absolute in all cases where he does not claim an exclusive jurisdiction of his own country over the person or the offence; and, in that case, it is his duty to send the person home for trial, unless the laws of his own country give him jurisdiction to try the cause, and the sovereign to whom he is accredited assents to his exercise of such jurisdiction within his realm."

Dana's note 129 to Wheaton, pp. 304-305.

"It is with reference to the precincts of legations that the fiction of extritoriality the most ran riot. Large quarters of cities were sometimes included in those precincts, and every inference was practically drawn which could follow in logic from their being held to be parts of the ambassador's country. No process of the territorial law could be executed in them and hence they became the refuges and haunts of criminals and debtors, an *Alsatia*. On the other hand the foreign sovereign and his ambassador were held to have in them a jurisdiction which, from the want of means to organize it, could not remedy the mischief, even were it not an offense to the territorial power for which logic could not atone. As late as 1867,

a Russian subject, Mickilchenkorff, having committed an attempt to murder in the Russian Embassy at Paris, and having been arrested and his prosecution commenced by the French authorities, the ambassador disputed their competence and claimed his extradition. But such a notion was quite antiquated, and the French Government refused to admit that the fiction of extraterritoriality could have such a scope, independently of the fact that on the occurrence of the outrage the Russians had themselves called for the aid of the local force. One of the first influences to effect a breach in the old system was the desire of the power represented not to make its legation the harbor for rebels and conspirators against the territorial sovereign, a desire founded on mutual courtesy and on a sentiment of the solidarity of governments; and thus political refugees, in whose favor the last vestiges of the system now exist, were among the first to be denied its advantage. In 1726 the Spanish government forced an entrance into the British Embassy at Madrid in order to arrest the Duke of Ripperda, the surrender of whom and of his papers had been refused; and in 1747 the Swedish Government used such means of annoyance, short of a violent entry, to obtain possession of Springer, accused of treason, who had taken refuge in the British Embassy at Stockholm; that the ambassador surrendered him under protest. His Government supported that protest, without effect, and, since no one would now treat common criminals with more indulgence than political ones, these two cases may be considered to have settled the rule of international law as not allowing an asylum in legations to accused persons of either class. Nevertheless such an asylum is in practice allowed from time to time in Spanish America, and has been given in Europe as late as 1862 in Greece and 1873 in Spain. Humanity has triumphed over the law, and not altogether without approval in the countries concerned, in which the victors do not know but that their turn for availing themselves of foreign hospitality may soon come. The United States have done their best, so far as instructions from Washington may go, to put an end to the practice; but the pressure of circumstances has been too great for either their or the British diplomats, and even consuls, on the spot to resist it. We may hope that the marked improvement which has taken place of late years in the political stability of the States in which asylum has been given will allow the practice to fall into desuetude.

“In nonpolitical matters, and in political ones where revolution is not so frequent as to be almost a recognized form of opposition, the extraterritoriality of the precincts of legations has now in this country only a very limited range of operation. Where a person is not protected from suit by any personal diplomatic immunity, nothing will prevent his being ultimately reached by the territorial juris-

diction, though the convenience of the minister must first be consulted as to the time and mode of effecting an arrest or serving process within the legation premises. In the last resort what was said by Lord Dudley, secretary of state for foreign affairs, in the case of Mr. Gallatin's coachman before referred to, will apply: 'With respect to the question of the supposed inviolability of the premises occupied by a foreign minister, I am not aware of any instance, since the abolition of sanctuary in England, where it has been held that the premises occupied by an ambassador are entitled to such a privilege by the law of nations.' The same view was stated by the court of appeal of Rome in a judgment of 30 August 1899, in which, while denying extraterritoriality to the Vatican, the conclusion drawn from it, had it existed for that palace, was thus repelled: 'The hotels in which [foreign sovereigns and persons entitled to diplomatic immunities] reside are not the less considered as a part of the national territory, and * * * penal justice has the right and the means of following criminals, in case of urgent necessity, into the places which enjoy an indirect immunity.' But in some countries the inviolability seems to have more vitality. The Institute of International Law resolved that 'no agent of the public authority, administrative or judicial, can penetrate into the hotel of a minister for the performance of his functions without the express consent of the minister.' If the minister raised undue difficulties, such a rule would necessitate a reference to his government, causing a delay which in some cases might defeat the ends of justice. The question is one in which there is no international agreement that can be opposed to the national law and jurisdiction."

Westlake, *op. cit.*, vol. I, pp. 281-283.

"The right of asylum which at one time was generally recognized in Europe has long since been abandoned there, and it is now held that the immunity of the mission premises from local jurisdiction extends only to the minister, his suite and household. And yet to a limited extent the practice of asylum for political offenders still exists in certain Spanish-American countries. The Department of State calls the attention of American diplomatic agents to the fact that in some countries, where frequent insurrections occur and consequent instability of government exists, the practice of extraterritorial asylum has become so firmly established that it is often invoked by unsuccessful insurgents and is practically recognized by the local government to the extent of respecting the premises of a consulate even in which such fugitives may take refuge. The Government of the United States does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its existence. While indisposed to direct its representatives to deny

temporary shelter to any person whose life may be threatened by mob violence, it has deemed it proper to instruct them that it will not countenance them in any attempt knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice.

"The correspondence of the Department of State furnishes many instances of the use of the legations, and sometimes of consulates, in the Spanish-American Republics as places of asylum by members of one or the other party in times of revolution and insurrection. One of the most noted cases in recent years was that of the American legation during the civil war in Chile in 1891. During its progress the legation sheltered some of the congressional party, and when that finally triumphed, the legations of all governments represented at the capital were resorted to by the Balmaceda partisans; President Balmaceda himself taking refuge in the Argentine legation, where he committed suicide. The legation of the United States was crowded with prominent Balmacedists, who fled there while the city was in the hands of a mob engaged in sacking the houses of the leading members of the defeated party. When the new government was organized, a demand was made on the American minister for the surrender of his guests. This being refused, a guard was thrown about the legation and American citizens and other visitors to it were arrested. Upon an earnest protest from the Secretary of State at Washington the troops were withdrawn, but the legation remained under police surveillance.

"Following the example of other legations, which had applied for and received safe conducts for their inmates to leave the country, the American minister, Mr. Egan, applied to the Chilean minister of foreign affairs for permission to the refugees in his legation to do the same. This application was refused, but a number of them, upon private assurance of safety, quietly left the legation. Several, however, remained; and after demand being made by the Chilean Government for their surrender for trial on the charge of conspiracy and refusal by the American minister, it was finally verbally agreed, at the expiration of nearly six months from the time asylum was taken in the legation, that the five remaining refugees should not be molested if they left the legation, went to the seaport of Valparaiso, and took passage on a foreign ship. They were accompanied to Valparaiso by the American minister and by the Spanish minister with two refugees from his legation, and placed on board an American man-of-war in the harbor, whence they took passage abroad in a British passenger steamer. In this case the question of asylum was complicated with an attack upon the crew of the United States naval vessel *Baltimore* in the streets of Valparaiso, which engendered bad blood between the two countries."

“The house, or, as it is usually called, the hotel, of the ambassador is by universal consent inviolable, and inaccessible to the ordinary officers of justice or revenue.

“The same remark applies to his carriage. Upon this valuable and necessary immunity was at one time grafted the monstrous and unnecessary abuse of what was called the Right of Asylum. In other words, the hotel was to be a place of refuge for offenders against the law of the state in which it was situated. Bynkershoek is clearly right in pronouncing that, whether common sense, the reason of the thing, or the end and object of embassies be considered, there is not even that faint colour of reason which the most absurd pretensions can generally put forth, to be alleged in favour of such a custom. History teems with examples of the evil consequences resulting from this absurd privilege, which was often extended from houses to whole districts and quarters of the town, as at Rome and Madrid.

“It is true that those states which have allowed this abuse are bound to give notice of their intention to abolish it previously to the reception of the ambassador. But it is also true that there can be no prescriptive right in any nation to demand a continuance of this obstacle to good order, justice and peace, wholly unconnected as it is with the maintenance of the security or dignity of embassies. And every Government must agree with the wish of the learned Merlin, that such a nuisance should be universally abolished. . . .

“In 1726, the Duke of Ripperda, the First Minister of Philip V, took refuge in the hotel of Lord Stanhope, the English Ambassador at Madrid. The King asked for the opinion of the Council of Castile, the first tribunal in the kingdom, whether, without a violation of International Law, he had a right to take his subject Ripperda, accused of high treason, by force, if other means were of no avail, from the hotel of the English Ambassador;—the answer was in the affirmative, and Ripperda was accordingly taken by force from the hotel, and his papers were seized at the same time.

“The British Government, of which the Duke of Newcastle was then prime minister, complained bitterly of this act, and demanded reparation for an alleged insult to the ambassador; the complaint, however, was founded rather upon the manner in which the act was done than upon a claim for the right, on the part of the ambassador, to have retained the refugee. Spain refused to make any reparation, and asserted boldly the legality of what she had done. The difference between the two nations increased in bitterness till, in the next year, war upon other grounds broke out between them. It would seem to follow, from the principles which have been laid down, that Spain was not guilty of any violation of International Law. . . .

“So long, however, as the ambassador does not convert his hotel into a place of refuge for offenders against the laws of the state, he has a right to enjoy the most perfect and uncontrolled liberty of action within the precincts of his hotel.”

Phillimore, *op. cit.*, vol. II, pp. 241-244.

VI. FISCAL IMMUNITIES OR EXEMPTION FROM TAXATION.

“The person of a diplomatic agent, his personal effects, and the property belonging to him as representative of his sovereign, are not subject to taxation. Otherwise he enjoys no exemption from taxes or duties as of right. By courtesy however most if not all, nations permit the entry free of duty of goods intended for his private use.”

Hall, *op. cit.*, p. 194.

“The fifth privilege of envoys in reference to their extritoriality is exemption from taxes and the like. As an envoy, through his extritoriality, is considered not to be subjected to the territorial supremacy of the receiving state, he must be exempt from all direct personal taxation and therefore need not pay either income tax or other direct taxes. As regards rates, it is necessary to draw a distinction. A payment of rates imposed for local objects from which an envoy himself derives benefit, such as sewerage, lighting, water, night watch, and the like, can be required of the envoy, although this is often not done. Other rates, however, such as poor rates and the like, he can not be requested to pay. As regards customs duties, international law does not claim the exemption of envoys therefrom. Practically and by courtesy, however, the municipal laws of many States allow diplomatic envoys within certain limits the entry free of duty of goods intended for their own private use. If the house of an envoy is the property of his home state or his own property, the house need not be exempt from property tax, although it is often so by the courtesy of the receiving state. Such property tax is not a personal and direct, but an indirect tax.”

Oppenheim, *op. cit.*, vol. I, p. 467.

“A diplomatic representative is conceded the privilege of the free importation of effects for his personal or official use, or for the use of his immediate family. The privilege is extended only to the heads of missions. It is a usage founded upon comity rather than an inherent right. In the United States it is not based upon a law of Congress, and is a matter entirely within the discretion of the treasury department. In some countries, as in Spain, the amount in value which a minister may import free is limited to a fixed sum. In the United States it is unlimited, but granted only upon written application or notice by the foreign minister to the secretary of

State, who advises the customs authorities through the secretary of the treasury, and in this way a record is kept of the importations. American diplomatic officers returning to the United States are allowed free entry of their personal effects, but this also is founded upon countesy, and is not specifically authorized by law.

"As there exist no positive law for the exemption at the customhouse of the duties on personal effects of foreign officials, a notice to the customs authorities of their expected arrival is required in each case. J. Q. Adams related that during his residence in England the Allied Sovereigns who visited London after the battle of Waterloo were required to submit to an examination of their baggage at Dover, because of the failure of the customs authorities to receive instructions. For a like reason, Mr. Rush, before the time of steam vessels, driven by stress of weather in 1817 into an unexpected English port, was subjected to a rigid scrutiny of his effects at the customhouse. 'Everything was ransacked; even the folds of linen opened; nothing was overlooked;' and some article contraband under the law were temporarily detained."

Foster, *op. cit.*, pp. 172-173.

"But the real property of a minister, other than his dwelling situate within the territory of the government to which he is accredited, and the personal property of which he may be possessed, as a merchant or private person, carrying on trade or other business, or in a fiduciary character as an executor, &c., are not exempt from the operation of the local laws and local jurisdiction. The reason of this is that the minister does not hold such lands and goods by virtue of his office; they are not annexed to his person so as, like himself, to be reputed out of the territory. Every dispute or suit respecting them must be carried on in the tribunals of the country, and they are subject to the ordinary process and proceedings of the courts, even of attachment and seizure. But, as already remarked, the house in which he lives, his carriages, furniture and personal property connected with his embassy are excepted from the rule. And in suing a minister, or serving other process of a court, in relation to real estate, other than his dwelling, or to personal property which has no relation to the embassy, the minister is summoned and proceeded against in the same manner as an absent person, he being reputed out of the country, and his independence does not permit of any immediate address to his person in an authoritative manner, such as sending an officer of a court of justice to him. This question is very clearly discussed by Vattel as follows: 'What has no affinity with his [the minister's] functions and character, can not partake of the privileges derived only from his functions and character. Should, then, a minister, as it has been often seen, engage in trade,

all the effects, goods, money, and debts, active and passive, belonging to his commerce, come within the jurisdiction of the country. And though this process can not be directly addressed to the minister's person, by reason of his independency, he is, by the seizing of the effects belonging to his commerce, indirectly brought to a necessity of answering by such seizure. The abuses arising from a contrary practice are manifest.'

"The minister's person, and personal effects, are not liable to assessment and taxation. But his real property and his movables (not connected with his mission or embassy) are all subject to taxation, according to the municipal laws of the country. By the usage of most nations, he is exempt from the payment of duties on the importation of articles for his own personal use, and that of his family. But this latter exemption is sometimes limited to a fixed sum per annum, or during the continuance of the mission. The government to which the minister is accredited, and of the country through which he may pass, has a right to adopt and enforce all necessary rules for the protection of its revenue from impositions and fraud, under the guise of importations or exportations, by foreign ministers or their dependents. Hence, goods purporting to be the personal effects of a minister, or for the private use of himself and family, can not claim a free passage through the customhouses, even where, by usage, they are exempted from duty. Sometimes regular duties are exacted at ports of entry, and the sums so paid are reimbursed to the minister direct from the national treasury, and, in other cases, the goods are placed under the customhouse seals, and transported to his residence under the direction of customhouse officers. The language of Vattel, on this point, is very clear and just. 'Among those rights,' says he, 'that are not necessary to the success of embassies, there are some likewise not founded on a general consent of nations, but which are, nevertheless, by the custom of several countries, annexed to the character. Such is the exemption from the duties of importation and exportation for things which come into a country for a foreign minister, or which he sends out. There is no necessity for him to be distinguished in this respect, since, by paying these duties, he would not be the less able to discharge his functions. If the sovereign is pleased to exempt him from them, it is a civility which the minister could not claim by any right, no more than that his baggage, or any chests, &c., which he sends for from abroad, should not be searched at the customhouse. Thomas Chaloner, the English ambassador in Spain, sent home a bitter complaint to Queen Elizabeth, his mistress, that the customhouse officers had opened his trunks in order to search them. But the Queen returned him for answer; *that an ambassador was to put up with everything that did not directly offend the dignity of his sovereign.*' So, while the ambassador is exempt from the

capitation tax, and every personal imposition relating to the character or quality of a subject of the State, he is expected to pay tolls, postage, &c., and the ordinary duties imposed on the goods and provisions he may use."

Halleck, *op. cit.*, vol. 1, pp. 382-384.

"This exemption includes direct personal taxes, such as the capitation or poll tax; special taxes like those on income and capital (unless the minister is engaged in commerce); sumptuary taxes like those on doors and windows; those for military purposes, quartering troops, etc.

"It does not necessarily include such indirect taxes as the excise, rates or assessments for local purposes from which he derives a benefit, inheritance taxes, customs dues, stamp and registry duties, tolls, etc. Nor does the immunity include taxes on realty. Even the residence of the minister is not necessarily exempt from the land tax. In respect to indirect taxes and the tax on his residence, the principles of reciprocity or courtesy are usually applied.

"For the practice of the United States, see 4 Moore, *Digest*, Secs. 667-669. Art. II of the 'Rules on Diplomatic Immunities' adopted by the Institute of Int. Law in 1895 declares: 'The foreign public minister, the functionaries officially attached to his mission, and the members of their families living with them, are dispensed from paying: (1) direct personal imposts and sumptuary taxes; (2) general imposts upon wealth, whether upon capital or upon income; (3) war taxes; (4) customs dues in respect to objects for personal use. Each Government may indicate the evidence required for these exemptions from taxation.'

Hershey, *op. cit.*, note 45, pp. 290-291.

"It is held that this exemption extends to income tax. If so, a diplomatic agent would have to apply for a return of income tax on national debt bonds, stocks, shares and debentures on which the tax is deducted at the source. As it is better that he should not expose himself to the necessity of having to make application for repayment, it will be better to avoid any investments of the kind in the country where he is stationed as representative of his sovereign."

Satow, *op. cit.*, vol. 1, p. 274.

"It is usual to assert that the person of the envoy, his movables, and the property belonging to him as the representative of his sovereign are not subject to taxation. A far more exact idea of the exemption can be drawn, however, from the statement of Twiss, who says that 'a foreign minister is privileged from being called upon to contribute personally to general taxes of a country; that is, to such taxes as are levied by the government, and which are available for the general purposes of the state, in which the ambassador is not

interested. But a foreign minister is not exempt from the payment of local dues, which are raised for purposes of local administration, and which are expended on local objects, from which he himself in common with his neighbors, derives immediate benefit. Thus he is liable to pay local rates assessed upon his hotel, or its site, for sewerage, lighting, watching, and similar objects. He is also liable to pay tolls for the use of roads and bridges, and also for the carriage of his letters, if they are conveyed to him by the local post.' Even the exemption from general taxes as thus formulated is not universally recognized. 'When a foreign legation occupies rented property in this country, the owner of the premises is not exempted from all lawful taxes;' and the 'rule observed by this government with respect to the taxation of property owned by a foreign government and occupied as its legation, is to accord reciprocity in regard to general taxation, but not to specially exempt it from local assessments, such as water rent and the like, unless it were definitely understood that these taxes would also be exempted by the foreign government upon a piece of property belonging to the United States and used for a like purpose by our minister.'

"As to immunity from customs dues, it is the usage of nearly all nations to permit the heads of all missions, temporary or permanent, of whatever rank, to import free of duty such articles as are intended for their private use or consumption. While in some countries the privilege is limited to a certain amount, such amount is usually so liberal as to preclude the idea that any restriction is really intended."

Taylor, *Treatise, Int. Pub. Law*, pp. 345-346.

"The person and personal effects of the minister are not liable to taxation. He is exempt from the payment of duties on the importation of articles for his own personal use and that of his family. But this latter exemption is, at present, by the usage of most nations, limited to a fixed sum during the continuance of the mission. He is liable to the payment of tolls and postages. The hotel in which he resides, though exempt from the quartering of troops, is subject to taxation, in common with the other real property of the country, whether it belongs to him or to his Government. And though, in general, his house is inviolable, and can not be entered, without his permission, by police, customhouse, or excise officers, yet the abuse of this privilege, by which it was converted in some countries into an asylum for fugitives from justice, has caused it to be very much restrained by the recent usage of nations."

Wheaton, *Int. Law*, pp. 319-320.

"Dr. Twiss (*Law of Nations*, 1, Sec. 203) states the present rule and practice somewhat differently: 'A foreign minister is privileged from being called upon to contribute personally to the general taxes

of a country; that is, to such taxes as are levied by the Government, and which are available for the general purposes of the State, in which the ambassador is not interested. But a foreign minister is not exempt from the payment of local dues which are raised for purposes of local administration, and which are expended on local objects, from which he himself, in common with his neighbors, derives immediate benefit. Thus, he is liable to pay local rates assessed upon his hotel or its site for sewerage, lighting, watching, and similar objects. This liability has sometimes been disputed, and Klüber holds it to be doubtful whether such rates can be rightfully exacted if the ambassador is unwilling to pay them. Wheaton considers the ambassador's hotel to be subject to taxation in common with other real property of the country. A practical difficulty will always be found in levying the rates, as the person and property of the ambassador are exempt from the jurisdiction of the civil tribunals, which must be appealed to in order to enforce payment, in the last resort."

Dana's note to Wheaton, pp. 319-320.

NOTE.—For the customary exemptions from customs duties of the various States, see Satow, *Diplomatic Practice*, vol. 1, ch. 20.

VII. THE GIVING OF TESTIMONY, ETC.

"The third privilege of envoys in reference to their extraterritoriality is exemption from subpoena as witnesses. No envoy can be obliged, or even required, to appear as a witness in a civil or criminal or administrative court, nor is an envoy obliged to give evidence before a Commissioner sent to his house. If, however, an envoy chooses for himself to appear as a witness or to give evidence of any kind, the Courts can make use of such evidence. A remarkable case of this kind is that of the Dutch envoy Dubois in Washington, which happened in 1856. A case of homicide occurred in the presence of M. Dubois, and, as his evidence was absolutely necessary for the trial, the Foreign Secretary of the United States asked Dubois to appear before the court as a witness, recognizing the fact that Dubois had no duty to do so. When Dubois, on the advice of all the other diplomatic envoys in Washington, refused to comply with this desire, the United States brought the matter before the Dutch Government. The latter, however, approved of Dubois's refusal but authorized him to give evidence under oath before the American Foreign Secretary. As, however, such evidence would have had no value at all according to the local law, Dubois's evidence was not taken, and the Government of the United States asked the Dutch Government to recall him."

Oppenheim, *op. cit.*, vol. 1, pp. 465-66.

"A member of a legation can not be required to appear in court as a witness or for any other purpose. The Dutch minister at Washington, in 1856, was witness to a homicide in a hotel. His attendance in the court at the trial as a witness was deemed essential, and the Government attorney applied to the Secretary of State to secure his presence. The minister refused to attend, and request on the Netherlands Government was made, through the American minister at The Hague, for instructions to its minister to appear and testify, at the same time bringing to its notice the provision of the Constitution of the United States giving the right to the accused to be confronted with the witness against him. The Netherlands Government consented that the minister might appear at the Department of State and make his declaration under oath, to which the minister added the condition that he should not be subjected to cross-examination. Such a declaration the Government attorney said would not be admitted as evidence, and it was not made. The conduct of the Dutch minister in manifesting such a disinclination to meet the requirements of justice was so displeasing to the Government of the United States that he ceased to be *persona grata*, and he was soon recalled.

"The Printed Instructions remind the diplomatic representative of the United States that the immunity from criminal and civil process can not be waived except by the consent of his Government, as it belongs to his office, not to himself. Neither should he consent to appear before a tribunal except by the consent of his Government. Even if called upon to give testimony under conditions which do not concern the business of his mission, and which are of a nature to counsel him to respond to the interests of justice, he should not do so without the consent of the President, which in such case would probably be granted."

Foster, *op. cit.*, pp. 161-162.

"In case of crime committed in the house of a foreign minister, or by one of his suite, and the accused be given up to be tried by the local authorities, as also in cases of crime committed by others, it not unfrequently happens that the only or most important witnesses are the minister, his family, his employes, or members of his legation. But if such persons are entirely exempt from local jurisdiction, how can their evidence be taken? If they refuse to give it, must the guilty escape unpunished? It is true that they can not be compelled to appear and give testimony in such cases, unless the right of compulsion be secured by treaty stipulations; nevertheless, modern custom has established the practice, that where the deposition of a minister, or of any person attached to his suite, is required in the courts of the country wherein the minister resides, the secretary, or minister

of foreign affairs, requests the minister to appear, or to cause the person summoned to appear, before some competent authority, have their depositions taken, and in due form communicated to the authority which made the request. In most cases, the depositions are taken before the secretary of their own legation. In criminal trials, the laws of some countries require that the testimony be given before the court, and in presence of the accused. In such cases, the foreign office requests the personal attendance of the minister, or person summoned, at the time and place designated. To refuse to comply with such request, without good and substantial reasons, is now regarded as discourteous and disrespectful to the government which makes it, and may justify the dismissal of such minister. In 1856 the government of the United States of America requested the recall of the minister of the Netherlands, for having refused to appear before the court, in the city of Washington, to give his testimony in a criminal cause which was then pending, and in which this minister was a most important witness. There may, however, be cases where the minister would be fully justified in declining to accede to such a request. For instance, if the court should be so wanting in dignity and character as to permit its officers and attorneys to annoy witnesses, by unnecessarily prolonged cross-examinations, and by questions irrelevant and insulting to the witness or to his government, a minister would unquestionably be justified in declining to appear himself or to direct the appearance of any of his suite, before such a tribunal. A court which allows such license, with respect to ordinary witnesses, forfeits its own dignity and character; but when it is permitted toward officials of foreign States, it is also guilty of disrespect to such States, and violates the law of international comity."

Halleck, *op. cit.*, vol. 1, pp. 379-380.

"A public minister is free from legal process as well as from personal restraint. He can not be compelled to appear in court and plead; but if he chooses to waive his privilege, the courts will deal with him either as plaintiff or defendant. Having submitted himself to their jurisdiction, he is bound to go through all that is needful to the due conduct of the case. He can not, for instance, refuse to answer awkward questions in cross-examination on the plea of diplomatic immunity. The question whether he may waive his privileges himself, or whether his government is alone competent to do so, is one to be decided, not by international law, but by the law of each separate state for its own diplomatic agents. If the evidence of the minister of a foreign power is required in an important case, he must be requested to appear and give it; but he can not be compelled to do so. Rather than defeat the ends of justice, ambassadors will generally consent to waive their immunity and give the re-

quired testimony. But in 1856 the Dutch minister at Washington, who was an essential witness in a case of murder, refused to appear in open court, though he was willing to make a deposition on oath. His government declined to order him to give evidence publicly, and the United States demanded his recall in consequence; but they could not force him to appear and testify. At the trial of Guiteau for the assassination of President Garfield, the minister of Venezuela appeared as a witness and gave his testimony in open court."

Lawrence, *op. cit.*, pp. 313-314.

"It is agreed that the ambassador must be exempt from all constraint upon his person and his movements and the employment of his time. He can not, of course, be arrested. It seems to be settled, that he can not be required to attend as a witness in court, as this would involve an authority over his time and movements; to be exercised at the discretion of the local tribunals, and with reference to the convenience or rights of other parties or of the court. The same objections exist to his being obliged to give a *deposition*, in the sense of the common law, where he is examined by a magistrate and subject to cross-examination. With greater force it applies to his being compelled to attend court as a defendant. Even if rules are made by which ambassadors are exempt from a levy of execution on their persons or property, from committal for contempt, and by which their convenience is consulted, still the fact remains that their convenience and freedom would be at the discretion of the authorities of the nation, legislative or judicial, or both; and, if an ambassador should decline to attend court, and to comply with such rules as the authorities chose to enforce, a decree might be rendered against him which would conclude his rights.

"The question has been a good deal discussed, whether the ambassador can proceed in the courts, as a plaintiff. It has been stated in many textbooks that he can do so, by waiving his personal privilege. If all that is meant by that is, that, if he does not waive the privilege and invokes the jurisdiction of the court as a plaintiff, it is competent for the court to try the case, and the doing so will furnish no just ground of offence, it may be true. But, if it is meant that, as between himself and his own sovereign, it is his right to waive the exemption and go into court as a plaintiff, it is enough, perhaps, to say that that is not a question on international law, but of the direct relation between a sovereign and his agent. If it is appropriate to say anything on that point, it may be suggested, that, without the assent of his own sovereign, no ambassador ought, by voluntarily appearing in court either as plaintiff or as defendant, to place himself in a situation by which he may forfeit his right to exemption from control over his time or movements. As far as the courts are

concerned, it would seem, that, if the ambassador invokes their jurisdiction as plaintiff, they may take cognizance of the case; and no just cause of international complaint can arise, if they withhold direct process on his person or property, and do not refuse to consult his reasonable convenience as far as the rights of others and the public business permit. In case a suit is filed against an ambassador, no nation allows the issue of a compulsory process against his person or property to secure his appearance; and it would seem to be equally a violation of principle to serve a notice upon him, and proceed to render a conclusive judgment against him in his absence, if he should decline to appear. The practice of France has been to send notice to the ambassador through the Foreign Office, but then, if he decline to appear, no further proceedings are had.

"These rules and the reasons for them, in the case of the ambassador, are applicable to all persons having the diplomatic immunity. The loss or waiver of the privilege may be of little consequence in the case of many of them, but the rule must be uniform.

Dana's note to Wheaton (8th ed.), p. 306.

"A diplomatic representative can not be compelled to testify, in the country of his sojourn, before any tribunal whatsoever. This right is regarded as appertaining to his office, not to his person, and is one of which he can not divest himself except by the consent of his government. Therefore, even if a diplomatic representative of the United States be called upon to give testimony under circumstances which do not concern the business of his mission, and which are of a nature to counsel him to respond in the interest of justice, he should not do so without the consent of the President, obtained through the Secretary of State, which in any such case would probably be granted."

Instructions to Diplomatic Officers (1897), p. 19.

"An attaché of the Danish legion in the United States instituted in the United States district court at Philadelphia a criminal prosecution against a local officer for the violation of his diplomatic privilege, in the service upon him of legal process in an action for debt. The Danish chargé d'affaires subsequently asked that the United States district attorney at Philadelphia be instructed not to require the personal attendance of the attaché to give testimony in the case. The Department of State, in reply, adverted to the circumstance that the prosecution was instituted at the instance and upon the information of the attaché himself to vindicate and establish the right which he claimed by reason of his official station, and expressed the opinion that it was competent for the court and was 'its exclusive right and province to dispense or not, according to its view of the grounds upon which the exemption is claimed, with the personal at-

tendance' of the attaché. The Department therefore declined to instruct the district attorney as requested, and added that it must necessarily be left to the court and jury to decide upon the sufficiency of the proof which that officer should furnish if he should decide to dispense with the personal attendance of the attaché."

Moore, *op. cit.*, vol. IV, pp. 642-643.

"No objection is seen to your giving your testimony of your own accord in the case referred to. [pending in a court of justice at Florence], or in any other place where it might be necessary for the purposes of justice. If, however, there should be any attempt, directly or indirectly, at compulsion in the matter, you would be expected to assert your privilege as a diplomatic agent, and in that you would be sustained by this government."

Mr. Fish, Sec. of State, to Mr. Marsh, min. to Italy, No. 547, Nov. 1, 1876, MS. Inst. Italy, 11, 1. Cited from Moore, *op. cit.*, vol. IV, p. 644.

"Baron von Gerolt, Prussian minister, having complained of the refusal of a justice of the peace in the District of Columbia to issue a warrant for the arrest of a German named Duplessis, who was alleged to have threatened or committed violence on the minister or his household, the matter was referred to the Attorney General of the United States for his opinion as to the right of a justice of the peace to issue a warrant for the arrest of an individual upon a mere declaration, unaccompanied by any oath, of a member of the diplomatic body. The Attorney General held that the justice of the peace was justified in his refusal to issue a warrant without an oath of some person against the alleged aggressor. The Department of State, in communicating this opinion to the Prussian minister, observed that if a diplomatic agent should be the only person who had witnessed the acts of an aggressor in such a case, and therefore the only person capable of testifying in regard to them, it could not be perceived 'why it should be considered incompatible with either his dignity or the exemption from the jurisdiction of the country to which he is entitled for him voluntarily to offer his testimony in the usual form.' (Mr. Hunter, Act. Sec. of State, to Baron von Gerolt, Aug. 2, 1852, MS. Notes to German States, VI, 310.)"

Moore, *op. cit.*, vol. IV, p. 644.

"On the trial of Guiteau, Señor Comancho, minister from Venezuela, who was present at President Garfield's assassination, was called as a witness for the prosecution. Before he was sworn, the following statement was made by the district attorney:

"If you honor please, before the gentleman is sworn, I desire to state, or rather I think it due to the witnesses to state, that he is the minister from Venezuela to this government, and entitled under the law governing diplomatic relations to be relieved from service

by subpoena or sworn as a witness in any case. Under the instructions of his government, owing to the friendship of that government for the United States, and the great respect for the memory of the man who was assassinated, they have instructed him to waive his rights and appear as a witness in the case, the same as any witness who is a citizen of this country.' ”

Guiteau's Trial, 1, 136. Cited from Moore, *op. cit.*, vol. IV, pp. 644-645.

“Early in the morning of December 31, 1886, a robbery was committed in the house of the Chilean minister at Washington. Later in the day the minister addressed a note to the Department of State expressing his appreciation of the action of the police in promptly effecting the arrest of the culprit, who proved to be a person formerly in the minister's employ as a servant. In acknowledging the receipt of the minister's note, the Department said: ‘Although fully aware of the immunity from judicial citation which pertains to your position as the envoy of a foreign government, yet inasmuch as our constitutional procedure requires that a person accused of crime shall be confronted with the witnesses against him, and as yourself and the members of your household are best qualified to give the evidence necessary to prevent a possible miscarriage of justice, I may be permitted to express the hope that you will courteously offer your aid toward the vindication of the laws in this case.’ ”

Moore, *op. cit.*, vol. IV, p. 645.

“November 16, 1893, the judge of the second civil court at the City of Mexico addressed certain interrogatories to the minister of the United States in a civil suit then pending. One of the inquiries was whether the Congress of the United States had on a certain day passed an act imposing a certain duty on imported ores, and another was whether the minister had authority from his government to testify in the case. The chargé d'affaires *ad interim* of the United States answered the various interrogatories, giving the information that was sought by them; but the inquiry whether he was authorized by his government to testify he answered in the negative. The Department of State declined to approve his action, saying: ‘It is a well-established rule that no public minister can testify in a civil or criminal case without the authorization of his government. Moreover, he can not even testify as a private individual, for he may not waive his official character and immunities without express authorization of his government.’ ”

Moore, *op. cit.*, vol. IV, p. 646.

“Mr. Iddings, secretary of the American embassy at Rome, having inquired whether he should give testimony against a pickpocket, as desired by an Italian court, Mr. Adeë, Acting Secretary of State, replied that his testimony might be given on terms consistent with his

representative dignity, and that, unless an examination in open court was indispensable, the giving of his personal deposition at the embassy was preferable. Mr. Iddings subsequently reported that his deposition was to be taken at the embassy by the judge before whom the case was pending."

Moore, *op. cit.*, vol. IV, p. 646.

VIII. EXEMPTION FROM POLICE REGULATIONS.

"The fourth privilege of envoys in reference to their extritoriality is exemption from the police of the receiving states. Orders and regulations of the police do in no way bind them. On the other hand, this exemption from police does not contain the privilege of an envoy to do what he likes as regards matters which are regulated by the police. Although such regulations can in no way bind him, an envoy enjoys the privilege of exemption from police under the presupposition that he acts and behaves in such a manner as harmonizes with the internal order of the receiving state. He is, therefore, expected to comply voluntarily with all such commands and injunctions of the local police, as on the one hand, do not restrict him in the effective exercise of his duties, and, on the other hand, are of importance for the general order and safety of the community. Of course he can not be punished if he acts otherwise, but the receiving government may request his recall or even be justified in other measures of such a kind as do not injure his inviolability. Thus, for instance, if in time of plague an envoy were not voluntarily to comply with important sanitary arrangements of the local police, and if there were great danger in delay, a case of necessity would be created and the receiving government would be justified in the exercise of reasonable pressure upon the envoy."

Oppenheim, *op. cit.*, vol. I, pp. 466-467.

"The public foreign minister is exempt from police jurisdiction, but this immunity must not be exaggerated. When it is stated that a foreign diplomatic agent is not subject to the police laws of the state where he resides, this does not mean that he is free from observance of the police regulations to which the nationals and foreigners living in the country are bound to conform, as, for example, the rules relating to traffic, lighting, bridges, powder magazines, etc. Indeed, it is beyond all discussion that diplomatic agents are bound to observe police regulations which have as their purpose security and public order. It is also admitted, without question, that the local government has the right to suppress acts which might cause disorder and disturbance of the public tranquility, for such acts are outside of diplomatic functions. The observance of police laws and prescrip-

tion is often recognized as a tacit condition of the reception of public ministers. In considering exemption from police jurisdiction it must be understood that, in any case of their violation, it is not permissible to proceed against a public minister by way of citation, but simply by way of notice, and that no direct or indirect constraint may be used against the minister. Assuredly, in such a case, it would be well to notify the government which the diplomatic agent represents in order that it might take action; but in case of urgency, the public welfare should take precedence of respect due to the public minister; moreover, diplomatic forms are safeguarded by the friendly tone of the communication.

"It is very certain that the local police always has the right to take measures to prevent actions contrary to the laws, the public safety and order; as much more so since it is the primary duty of diplomatic agents to do nothing that might interfere with police laws and regulations of the state upon whose territory they reside. The public minister is bound then to refrain from acts which tend to disturb the existing order, and to see to it that nothing happens within his residence that might injure the public health contrary to the ordinances relating thereto. In failing to respect the police laws and regulations relating to public order and safety, he would violate every principle upon which his immunity is based; he would even be considered as having renounced it. Since the respect due to the dignity of the foreign state is not incompatible with the cause of security and good order, if the public minister wishes, for example, in his gardens, to indulge in target practice injurious to his neighbors, or to light dangerous fires, the police would have the right to forbid these acts. In such a case an official notice on the part of the police authorities should be sufficient to put an end to the cause of the trouble or inquietude; for it can not be supposed that the public minister would care to engage in an open struggle with the authorities. But if the agent should persist in his reprehensible conduct, the police would unquestionably have the right to intervene in order to avert immediate danger. Immunities are respectable things, but it is proper to curtail them as much as possible in the interest of public order. It is also true that the public foreign minister should not permit in his residence people of the country where he resides to engage in games of chance where gambling is forbidden by the laws, and that he should rigorously prohibit people of his suite from engaging in forbidden trade. If he does not conform to these duties, the government should be notified of the fact."

Pradier-Fodéré, *Traité de droit int. public*, III, pp. 332-334.

"In considering the immunities of diplomatic officers, it is important to draw a distinction, which, it is believed, has not usually

been noticed, between measures of punishment and measures of prevention. The theory of diplomatic immunity is not that the diplomatic officer is freed from the restraints of the law and exempt from the duty of observing them, but only that he can not be punished for his failure to respect them. The punitive power of the state can not be directly enforced against him. It will hardly be denied, however, that it is his duty to respect the laws of the country in which he resides, and that he may in many conceivable cases be prevented from doing unlawful acts, for which, if he were allowed to commit them, he could not be punished. This distinction is peculiarly applicable to police regulations, made for the purpose of assuring the public health and safety. Take, for example, the case of regulations with regard to the use of the public highways. Immunity from punishment for the violation of such regulations by no means implies that actual coercion might not be employed in protecting the public from injury, as by running down persons in the street. Foreign men-of-war, in spite of their extritoriality, are, as has been seen, required to observe harbor and sanitary regulations. The immunity from judicial process can not be perverted into a license to disregard the health and safety of the public, nor can it be construed as precluding the actual prevention of injuries to person or property, where, but for the exercise of immediate restraint, irreparable damage is threatened.

"A citizen of Washington having complained to the Department of State, in 1888, that there was a flock of barnyard fowls on the premises of the British minister, which gave much annoyance to persons living in the neighborhood, the Department in reply referred to the act of Congress of January 26, 1887, 24 Stat., 368, which authorized the commissioners of the District of Columbia to make and enforce police regulations in regard to various matters, including 'the keeping or running at large of dogs and fowls.' The Department added that, while it was not informed as to what regulations, if any, the commissioners had adopted under the act in question, the proper course for its correspondent would be, in the first instance, to bring the complaint to the notice of the local authorities, who could investigate the matter, and determine whether there had been any violation of the police regulations established for the District."

Moore, *op. cit.*, vol. IV, pp. 678-679.

"The primary object of the diplomatic coachman's badge is 'to identify the equipage as that of a foreign ambassador or minister in actual use for the envoy's personal behoof. Its second purpose is to establish the right of the equipage to invoke the aid of the police to assist in obtaining for the envoy all the usual and proper courtesies

which should properly be shown to his high office. It does not * * * carry with it any privilege of disregarding the ordinary rules of circulation and traffic, or doing anything calculated to impair public order or to imperil life or property. In ordinary conditions of street travel, where the envoy's equipage is exposed to no interruption or delay, it may be presumed to follow its course to its own discretion within the ordinary rules of the road the same as any private equipage, without needing any assistance from the badge to enable it to do so. The principal application of the badge is on occasions of extraordinary concourse or unusual congestion of travel, where the control of the police is necessary to keep order and prevent a deadlock. On all such occasions it is expected that, upon exhibition of the envoy's permit, the efforts of the police will be promptly and courteously rendered to facilitate passage through the obstruction and access to his destination, especially if the occasion be one of a public ceremony or large entertainment to which the envoy is presumably an invited guest.'"

Mr. Hay, Sec. of State, to Mr. Wight, Feb. 17, 1900, 243 MS. Dom. Let. 104. Cited from Moore, *op. cit.*, vol. IV, p. 679.

"While there are United States statutes prohibiting hunting, shooting, or capturing game in certain public parks and reservations, there is none that forbids generally hunting or shooting within the United States, or that imposes license taxes for hunting or shooting in territory subject to United States jurisdiction; and 'as no license taxes are required, no exception from their payment is made in favor of diplomatic or consular representatives of foreign governments residing here.'"

Knox, At. Gen., Jan. 2, 1902, 23 Op. 608. Cited from Moore, *op. cit.*, pp. 679-80.

IX. OTHER PRIVILEGES AND IMMUNITIES.

"When permanent legations were first established by states at one another's courts, many extreme pretensions were put forward by ambassadors, and among them was the claim to exercise civil and criminal jurisdiction over the members of their suites according to the laws of their own country. But in modern practice no such right is conceded, and it would not now be demanded. In civil matters the utmost a diplomatic minister can do is to authenticate testaments and contracts made before him by members of his suite; and his chaplain may solemnize marriages between subjects of the state that has accredited him in the chapel of the embassy, if the laws of their country allow it; but there is great doubt and great diversity of practice with regard to the marriage of foreigners, or marriages between a subject of the ambassador's state and a foreigner. In criminal matters that arise between members of the suite, the head

of the legation takes and prepares the evidence, but sends the accused home for trial; and he possesses a similar power as to the servants of the embassy, though its limits are uncertain and disputable."

Lawrence, *op. cit.*, p. 314.

"Other privileges of public ministers are the right of private worship (which is no longer of great importance in this age of toleration); the right, according to their rank, to certain ceremonial honors and marks of respect; a very limited and purely voluntary disciplinary jurisdiction over members of their suites or official families; and, if permitted by their home governments, the right of performing certain civil functions, such as the issuance of passports to fellow nationals, the authentication of certain documents like wills, contracts, etc., and the performance of the marriage ceremony."

Hershey, *op. cit.*, p. 291.

"A sixth privilege of envoys in reference to their extritoriality is the so-called Right of Chapel (*Droit de chapelle* or *Droit du culte*). This is the privilege of having a private chapel for the practice of his own religion, which must be granted to an envoy by the Municipal Law of the receiving state. A privilege of great worth in former times, when freedom of religious worship was unknown in most states, it has at present an historical value only. But it has not disappeared and might become again of actual importance in case a state should in the future give way to reactionary intolerance. It must, however, be emphasized that the right of chapel must only comprise the privilege of religious worship in a private chapel inside the official residence of the envoy. No right of having and tolling bells need be granted. The privilege includes the office of a chaplain, who must be allowed to perform every religious ceremony within the chapel, such as baptism and the like. It further includes permission to all the compatriots of the envoy, even if they do not belong to his retinue, to take part in the service. But the receiving state need not allow its own subjects to take part therein.

"The seventh and last privilege of envoys in reference to their extritoriality is self-jurisdiction within certain limits. As the members of his retinue are considered extritorial, the receiving state has no jurisdiction over them, and the home state may therefore delegate such civil and criminal jurisdiction to the envoy. But no receiving state is required to grant self-jurisdiction to an ambassador beyond a certain reasonable limit. Thus, an envoy must have jurisdiction over his retinue in matters of discipline, he must be able to order the arrest of a member of his retinue who has committed a crime and is to be sent home for his trial, and the like. But no

civilised state would nowadays allow an envoy himself to try a member of his retinue. This was done in former centuries. Thus, in 1603, Sully, who was sent by Henri IV of France on a special mission to England, called together a French jury in London and had a member of his retinue condemned to death for murder. The convicted man was handed over for execution to the English authorities, but James I reprieved him."

Oppenheim, *op. cit.*, vol. 1, pp. 467-469.

"A minister, resident in a foreign country, is entitled to the privilege of religious worship according to the peculiar forms of his own faith, although it may not be generally tolerated by the laws of the state to which he is accredited. But this right is, in strictness, confined to his own residence; he can do what he pleases within his own walls, and nobody has a right to object or interfere. 'But if the sovereign of the country where he resides has good reasons for not permitting him to exercise his religion in a manner any way public, this sovereign is not to be blamed, much less accused of offending against the law of nations.' This limitation, which Vattel has placed on the right of religious worship, is approved by other text-writers, although, at this day, no civilised country refuses ambassadors this free exercise, except so far as it might interfere with municipal police regulations for maintaining public order. 'The increasing spirit of religious freedom and liberality,' says Wheaton, 'has gradually extended this privilege to the establishment, in most countries, of public chapels, attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rites celebrated beyond the walls of the chapel.' Privileges of this nature are usually matters of treaty stipulations."

Halleck, *op. cit.*, vol. 1, p. 385.

"A minister, resident in a foreign country, is entitled to the privilege of religious worship in his own private chapel, according to the peculiar forms of his national faith, although it may not be generally tolerated by the laws of the State where he resides. Even since the epoch of the Reformation this privilege has been secured by convention or usage between the Catholic and Protestant nations of Europe. It is also enjoyed by the public ministers and consuls from the Christian powers in Turkey and the Barbary States. The increasing spirit of religious freedom and liberality has gradually extended this privilege to the establishment, in most countries, of public chapels attached to the different foreign embassies, in which not only foreigners of the same nation but even natives of the country of the same religion are allowed the free exercise of their peculiar worship. This does not

in general, extend to public processions, the use of bells, or other external rites celebrated beyond the walls of the chapel."

Wheaton, *op. cit.*, p. 324.

"By virtue of this voluntary jurisdiction a diplomatic agent may still, in accordance with the forms prescribed by the laws of his own state, authenticate and legalize wills and other unilateral acts and contracts, affixing his seal and the like. It seems to be clear that such an agent may legalize contracts of marriage between members of his suite; and some writers claim that he may also legalize marriages between subjects of his state, other than members of his suite, when specially authorized to do so by his sovereign. There is, however, no general custom compelling other states to recognize such marriages. Even in countries where the marriage of two foreigners may be solemnized it seems that the marriage of a subject of the state with a foreigner in the house of his ambassador, according to the law of the foreign state, would not, as a general rule, be upheld. As evidence of the tendency in that direction reference may be made to the case of *Morgan v. French*, in which a marriage between an Englishman and a French subject, celebrated at the English embassy at Paris, was declared void by the Tribunal Civil de la Seine, and to the case of a marriage between an Austrian and an English woman, celebrated in English form at the English embassy at Vienna, annulled by the Supreme Court of Austria in 1880. There is, however, no well-defined rule upon the subject, which is involved in great confusion and uncertainty."

Taylor, *op. cit.*, p. 347.

"Two particulars only remain to be noted with respect to the legal position of a diplomatic agent. Of these the first is that he preserves his domicile in his own country, as a natural consequence of the fact that his functions are determinable at the will of his sovereign, and that he has therefore no intention of residence. The second is that notwithstanding the general rule that acts intended to have legal effect, in order to have such effect in the country where they are done, must conform to the territorial law, a diplomatic agent may legalise wills and other unilateral acts, and contracts, including perhaps contracts of marriage, made by or between members of his suite. It is said by some writers that a diplomatic agent may also legalise marriages between subjects of his state, other than members of his suite, if specially authorized to do so by his sovereign, but this view is unquestionably erroneous. There is no general custom which places a state under an obligation to recognise such marriages, and in some states they certainly will not be recognised."

Hall, *op. cit.*, p. 195.

X. MINISTERS RECALLED OR NOT YET RECEIVED.

Ministers who have been recalled, pending their departure from the country, as also ministers who have arrived in the country to which they have been accredited, enjoy diplomatic privileges and immunities to a qualified degree for a reasonable period unless these are abused. But such immunity probably rests upon customary usage rather than upon strict law.

CASE OF M. PICHON.

“ M. Pichon, commissary general of commercial relations and chargé d'affaires of France in the United States, was, toward the close of February, 1805, served with a *capias* in a suit brought against him on certain bills of exchange. He claimed his privilege as chargé d'affaires. By his credentials, which his counsel produced, his continuance in the character of chargé d'affaires was limited to the arrival of a French minister plenipotentiary in the United States. A deposition by Mr. Pichon was filed, by which it appeared that the minister, General Turreau, arrived in the United States about November 12, 1804; that since that time M. Pichon had, under the instructions of his government, been making necessary arrangements to return with his family to France; that his detention in the United States since the arrival of General Turreau had been exclusively due to the business of closing his official transactions as chargé d'affaires, to delay in receiving his public papers and documents, which, having been shipped by vessel from Alexandria to Philadelphia, had, because of ice in the Delaware, been carried to New York, and to the impracticability of obtaining a passage for Europe at Philadelphia for some time past; and that he had never abandoned or suspended his intention to return to France, but was, on the contrary, determined to return thither as soon as practicable. He further deposed that the bills of exchange on which the suit was brought were given by him as a public agent of France for the equipment and supply of certain French frigates, and not on his private account.

“ Counsel for M. Pichon insisted on his immediate discharge on the ground of diplomatic privilege, maintaining that ‘ he was not bound to produce any testimonials of his public character, the notoriety of his reception by the President being all that the nature of the case, or uniform usage, required; ’ and that a day’s delay in recognizing his privilege to obtain a certificate from the United States Government must either compel him to give bail or to submit to actual imprisonment.

“ Counsel for the plaintiff disputed the extent of the privilege claimed and the sufficiency of the excuse for M. Pichon’s protracted residence in the United States. They insisted that his appointment

as chargé d'affaires was limited by its own terms; that his arrival and continuance were chiefly on account of his consular functions, and that at least proof should be produced from the Secretary of State of the United States of his reception as a minister.

"The court were decidedly of opinion that Mr. Pichon would be entitled to privilege as chargé d'affaires till his return to France; but Chief Justice Shippen seemed inclined to wait for information from the Department of State, as to his actual reception by the President in that character. On its being intimated, however, that the attorney of the district had become responsible to the sheriff for Mr. Pichon's appearance, only till the sense of the court could be obtained; and that Mr. Pichon must now, probably, submit to imprisonment under the *capias*: the judges concurred in discharging him absolutely from the process.

"After this decision the plaintiff obtained another *capias* from the United States circuit court, but, before it was served, the bills were paid by the French Government, and the proceedings were suspended after a motion to quash the writ on the ground of privilege.

Dupont v. Pichon (1805), Supreme Court of Pennsylvania, 4 Dallas, 321. Cited from Moore, *op. cit.*, Vol. IV, pp. 662-664.

"Far would it be from the intention of the American Government to draw within its rigorous limits the exemption from ordinary legal process of a foreign public officer. It would extend to them a liberal measure of time and a full portion of indulgence for the execution of the trust, and for departure after its completion. But it can not perceive the justice of extending these privileges beyond their limits as sanctioned by custom for purposes of injustice and wrong."

Mr. Adams, Sec. of State, to Mr. d'Anduaga, Nov. 2, 1821, MS. Notes to For. Legs. III, 29. Cited from Moore, *op. cit.*, vol. IV, p. 664.

CASE OF MR. BARROZO

"June 9, 1826, Mr. Barrozo Perera presented his credentials as chargé d'affaires of Portugal to the United States under appointment of the Princess Isabel Maria, as president of the regency constituted by John VI to administer the Government during his illness, and was subsequently recognized as chargé d'affaires by the Infante Dom Miguel on the latter's accession to the regency in the name of his brother Dom Pedro IV. Subsequently, on July 18, 1828, Mr. Barrozo informed the Department of State that, in consequence of the direct usurpation of the royal power by Dom Miguel, in derogation of the rights of Dom Pedro IV and in violation of the constitution of the Kingdom, he deemed it to be his duty to cease his functions as diplomatic agent of Dom Miguel's government, and that he would submit his action to Dom Pedro IV, whose authority alone, or that of persons acting in his name, he could recognize. Mr. Barrozo was informed

that his letter was laid before the President and placed upon the files of the Department of State as evidence of the important step which he had taken. On August 25, 1828, however, Mr. Barrozo advised the Secretary of State that a provisional junta had been installed at Oporto for the purpose of maintaining the constitutional authority of Dom Pedro IV; that, by previously ceasing to discharge his diplomatic functions, he did not consider himself as ceasing to be *chargé d'affaires* of his Most Faithful Majesty; and that he believed it to be his duty to resume his diplomatic functions as representative of the legitimate King. This note was received at the Department of State during the absence of the Secretary, and was answered by the statement that it would be laid before him on his return. On November 6, 1828, Mr. Barrozo, as *chargé d'affaires* in formed the Secretary of State of the arrival in England of the young Queen of Portugal, Dona Maria de Gloria, and later, in the same month, he announced the abdication by Dom Pedro of the Crown of Portugal in her favor. These notes remained unanswered, and the only communication subsequently addressed to Mr. Barrozo, during the administration of President Adams, was a circular sent out by the chief clerk to members of the diplomatic corps inviting them to attend the inauguration of President Jackson.

"On August 30, 1828, Mr. Torlade d'Azambuja presented to the Department of State his credentials, bearing date March 31, 1828, as *chargé d'affaires* of Portugal, under appointment of Dom Miguel, as regent. No action was then taken, and the information soon afterwards received of the change that had taken place in the Government of Portugal having rendered it necessary that he should present new credentials his recognition was delayed. On April 18, 1829, he communicated to the Secretary of State a copy of new credentials, and asked that a time should be designated for the presentation of the original. This note remained unanswered, as did several other communications from Mr. Torlade. The United States was then awaiting the course of events in Portugal, till the result should enable it to decide whether to recognize the governmental authorities by whom Mr. Torlade was accredited. On October 1, 1829, however, he was informed by the Secretary of State that he would be received on the following day, when he appeared and delivered his original letter of credence and was recognized as *chargé d'affaires* of the Portuguese Government.

"After his reception as *chargé d'affaires*, Mr. Torlade demanded of Mr. Barrozo the surrender of the archives of the Portuguese legation; and when the latter refused to deliver them up had him arrested and confined upon his refusal to give bail in the sum of \$100,000 for his appearance at the trial, which was to decide the rights of the respective parties. Under these circumstances Mr.

Barrozo, on October 30, 1829, applied to the Department of State for a certificate of his recognition by the President as chargé d'affaires of Portugal, and he, at the same time, communicated to the Department an application which he had made to Mr. Dallas, United States attorney for the eastern district of Pennsylvania, where the suit was pending, for his interference in the case. Mr. Dallas had declined to interfere and had advised Mr. Barrozo to employ counsel.

"The Department of State submitted the matter to Mr. Berrien, the Attorney General, for an opinion on the question whether Mr. Barrozo was, on October 30, 1829, 'entitled to the enjoyment, within the United States, of the privileges and immunities which the law of nations attaches to the public character of diplomatic agents regularly accredited by a foreign Government.' Mr. Berrien advised that the assumption of regal power by Dom Miguel, in exclusion of the authority of his brother, Dom Pedro IV, whose rights he had before recognized through the agency of Mr. Barrozo, did not *ipso facto* extinguish the latter's letter of credence; that, in order to produce this result, two things were necessary—(1) the exercise of the will of Dom Miguel in the selection of another representative, and (2) the recognition of his authority by the United States.

"A copy of the opinion of the Attorney General, together with a statement of the facts, was communicated to Mr. Dallas, with directions to lay the papers before the court and to permit the parties to the suit to have the full benefit of them; and both Mr. Barrozo and Mr. Torlade were informed by the Department of State of what had been done.

"November 19, 1829, Mr. Torlade, alluding to the protracted delay of the court in deciding the matter in controversy, again invoked the interference of the United States in obtaining the archives from Mr. Barrozo, either by persuasion or by proceedings in the United States Supreme Court. On the 29th of the same month the Secretary of State addressed a note to Mr. Barrozo, requesting him to deliver the archives to Mr. Torlade. Mr. Barrozo, on January 6, 1830, declined to comply with this request, on the ground that it would imply a recognition on his part of the usurpation of Dom Miguel, whom Mr. Torlade represented, but promised to refer the question to the decision of the Emperor of Brazil, as guardian of the Queen of Portugal.

"On March 13, 1830, the district court of Philadelphia, before which the suit against Mr. Barrozo was pending, decided that the writ against Mr. Barrozo was irregular and void and discharged his bail. The court based its opinion upon the ground (1) that an outgoing minister was privileged from suit; (2) that the Executive was the best source of information as to the immunities of public ministers; and (3) that the opinion of the Attorney General prepared for the Department of State ought to be received as the sense of the

government on the subject. The views expressed in Mr. Berrien's opinion were, indeed, fully adopted by the court.

"Upon the rendition of this decision both Mr. Barrozo and Mr. Torlade appealed to the Department of State, the former demanding the prosecution of the persons concerned in his arrest, and the latter protesting against the decision and announcing his intention to carry the matter to the Supreme Court of the United States, unless the Executive should otherwise afford him relief. On April 7, 1830, Mr. Barrozo was informed by the Department of State that instructions had been given to the United States district attorney at Philadelphia to institute a prosecution against the persons concerned in his arrest, with directions, however, to suspend action if it should appear to be Mr. Torlade's intention to carry the case to the Supreme Court. Information to the same effect was given to Mr. Torlade.

"In April, 1830, Mr. Dallas presented to the grand jury indictments against the attorney who sued out and the bailiff who executed the writ by virtue of which Mr. Barrozo was arrested and imprisoned. The case went to the Supreme Court of the United States on a difference of opinion, and a *nolle prosequi* was entered by direction of the President.

Moore, *op. cit.*, Vol. IV, pp. 664-667.

CASE OF CATAAZY.

"November 15-27, 1871, Mr. Cataazy, in acknowledging the receipt of a note from Mr. Fish with regard to the transmission of his passports, stated that in retiring from the Russian mission to the United States he reserved to himself 'the maintenance of the diplomatic immunities which are granted by international law to every representative of a foreign Power until the presentation of his letters of recall and his departure from the country where he exercised his diplomatic functions.' Mr. Fish thought that the rule of public law was stated by Mr. Cataazy too broadly, since intercourse between a diplomatic agent and the Government to which he was accredited was not always terminated 'only by the presentation of the letters of recall of such agent.' There were, said Mr. Fish, several other ways in which such intercourse might be concluded, and while in any event the diplomatic immunities of the retiring agent might be claimed 'for a reasonable time after his official functions shall be at an end,' the length of this period 'must depend upon circumstances, of which the Government to which he had been accredited is to be the judge. The main object for which the privilege is allowed is to enable the diplomatic representative to adjust his private affairs and to depart the country without annoyance. If, however, the privilege shall be abused by an undue lingering in the country by such agent after his

official functions are at an end, the Government of that country is justified in regarding the immunities as forfeited.'”

Mr. Fish, Sec. of State, to Gen. Gorloff, Dec. 1, 1871, S. Ex. Doc. 5, 42 Cong., 2 sess., 26-27.

Cited from Moore, *op. cit.*, vol. IV, pp. 667-668.

CASE OF MINISTER NOT RECEIVED.

“December 19, 1855, Mr. Parker H. French communicated by letter to the Secretary of State a copy of what purported to be credential letters from Don Patricio Rivas, as provisory President of the Republic of Nicaragua, accrediting him as minister plenipotentiary of that Republic to the United States and requested an interview preparatory to the formal presentation of his credentials to the President. The Secretary of State replied by letter on the 21st of December that the President did not yet see cause to establish diplomatic intercourse with the persons at that time claiming to exercise political power in the State of Nicaragua, and that he did not deem it proper at the moment to receive anyone as minister to the United States duly appointed by that Republic. Almost immediately afterwards it was reported that Mr. French was concerned in the engagement at New York of men and of arms for transmission to Nicaragua. With reference to this report Mr. Cushing, then Attorney General of the United States, instructed the United States district attorney at New York as follows:

“Colonel French is entitled to diplomatic privilege in the United States only in a very qualified degree. He is not an accredited minister, but simply a person coming to this country to present himself as such, and not received, by reason of its failing to appear that he represents any lawful government. Under such circumstances, any diplomatic privilege accorded to him is of mere transit and of courtesy, not full right; and that courtesy will be withdrawn from him so soon as there shall be cause to believe that he is engaged in here, or contemplates, any act not consonant with the laws, the peace, or the public honor of the United States. The President * * * desires you to make distinctly known to the principal party the precise relations of the case.’

“Subsequently the district attorney wrote that a warrant for French’s arrest had been issued, and inquired whether it should be executed. Mr. Cushing in reply quoted from his previous letter, and added: ‘He [the President] directs me to say * * * that, proceeding in the spirit of the fullest consideration for the diplomatic character, he desires you to notify Mr. French of the present charge, and to inform him that no process in behalf of the United States will be served upon him, provided he shall not become chargeable with

any further offense and shall depart from the country within a reasonable time.'”

Moore, *op. cit.*, vol. IV, citing Mr. Cushing, Atty. Gen., to Mr. McKeon, Dec. 24, 1885, H. Ex. Doc. 103, 34 Cong. 1 sess. 13; same to same, Dec. 27, 1885, *id.* 14.

“It is unnecessary to recall that the immunity of foreign public ministers also extends to their personal effects, particularly to their baggage, to the furniture, and the equipment. The extension of this immunity to their effects is intended especially to safeguard their writings and correspondence. But the immunity is necessarily limited by the police powers of the state. A minister should not make such use of his equipage or permit such use to be made of it as would enable delinquents to evade the jurisdiction of the country of his residence, or introduce fraudulent articles prohibited by the law.”

Pradier-Fodéré, *op. cit.*, p. 330.

XI. INVIOABILITY OF CONSULATES. (See CONSULS.)

Consuls are, in general, official agents sent by a State to foreign ports and cities mainly for the purpose of promoting the commercial and industrial interests of the appointing State and its citizens or subjects. Consequently, they do not, as a rule, possess diplomatic privileges and immunities; but they do enjoy certain rights and privileges which are derived, in part from international law and in part from treaties, local usages, or general custom based upon considerations of respect or reciprocity.

It is generally agreed that professional consuls are under the special protection of international law, and that they are entitled to a certain degree of respect and personal immunity, though they are not necessarily inviolable, unless such inviolability has been secured by treaty. It is also agreed that, as in the case of diplomatic agents, the official archives and correspondence of the consulate are inviolable. This immunity carries with it inviolability of that portion of the consul's residence in which the archives are contained, but it does not extend to the private papers or personal effects of the consul. (See *Consuls*.)



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MEMORANDUM OF AUTHORITIES ON THE LAW OF ANGARY

BY
THEODORE HENCKELS
AND
HENRY G. CROCKER

COMPLETED JULY 15, 1918



WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

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PART I

**EXTRACTS FROM AMERICAN AND FOREIGN (PARTICULARLY
GERMAN AND DUTCH) WORKS ON INTERNATIONAL
LAW CONCERNING THE RIGHT OF ANGARY**

ALBRECHT.

REQUISITIONS OF PRIVATE NEUTRAL PROPERTY, ESPECIALLY OF SHIPS.

[Supplement I to vol. vi of *Zeitschrift für Völkerrecht und Bundesstaatsrecht*.
Breslau, 1912.]

INTRODUCTION.

SECTION 1.—THE PROBLEM.

The modern law of war rests on the basic idea that war is a relation between one State and another State, and that it is not being waged against the population of the enemy country. The ideal condition corresponding to this principle would be that the population of the belligerent States should in no way be interfered with in the war, and especially that the belligerents should not seize the property of private individuals. It is impossible, however, actually to realize this ideal. The armies cannot fight only upon the soil and property of the State; even privately owned lands must become the scene of war operations. Destructions, even of private property, become often necessary in consequence of military operations. This has been admitted from time immemorial and has again been confirmed in the regulations for war on land worked out by the Hague Conferences, to the effect that in enemy territory the belligerent may, through requisitions, procure from private individuals those objects which he needs for his army.

Such requisitions affect especially the nationals of the enemy State. It may be questioned as to whether they are admissible also with regard to the nationals of neutral States. Since, according to general basic principles, neutrals may not in the course of a war be treated as enemies, it might be asserted that even private neutral property found within the territory of one of the belligerent States, must be protected against and remain unaffected by all burdens of war. This can certainly not be the case with regard to pieces of land within the territory of one of the belligerents. They are absolutely subject to the same measures, as if they belonged to a national of the enemy State. In contradiction of this it has been asserted that movable articles of any sort, belonging to a neutral and recognizable as such could not be subject to a requisition made by the belligerent, for the reason that the neutrality of the owner would in such case be violated. It is the object of this study to ascertain and set forth whether or not and to what extent this view is correct according to the accepted law of nations.

SECTION 2.—THE IDEA OF REQUISITIONS.

In war it frequently happens that a belligerent has not on hand objects which he needs for waging war or for maintaining his troops, objects which he can not either really secure through the ordinary

channels. In such cases he does endeavor to provide for his needs in the locality where he just then is stationed. This he can accomplish in different ways. The natural thing to do would be that he should seek to procure in the open market such things as he may be in need of, or, if he should use them only temporarily, to make contracts with the owners in regard thereto.

But this would not suffice if the belligerent were restricted to such a course of action in order to provide for his needs. For here and there owners would refuse to dispose of their things for war purposes. In such cases, the belligerent must secure through force that which he is in need of. This he usually accomplishes by requiring the local authorities to supply the necessary articles. This demand made of the local authorities is requisition in its technical sense.¹ Generally, and for political reasons, the belligerent will pay cash for the articles supplied, in order not to embitter the population against himself; he is not bound, however, by law to do so. He may content himself with the giving of a receipt in virtue of which the respective persons may subsequently endeavor to secure compensation.

Now and then, however, a request to the local authorities might prove too inconvenient, or for other reasons, inopportune, and the belligerent may deem it proper merely to take from the owners such articles as he may need by making either cash payment for them or issuing a receipt. This is not a requisition in the real sense of the word, for application to the local authorities is not made. Nevertheless, according to the customary language of international law, even such a proceeding is termed a requisition. The word is so used in Article 52 of the regulations for war on land worked out by the Second Hague Conference, and all provisions in political treaties, with regard to requisitions, are likewise applicable to these cases.

The most diverse things may form the object of requisitions: necessities of life, equipment for the troops, billetings, means of transportation, even ships, etc. According to the purpose two sorts of requisitions may generally be distinguished: (1) requisitions for the use of a thing, when the belligerent but momentarily employs the thing, and returns it to the owner after such employment has ceased; (2) requisitions of the substantial thing, when the belligerent means to use up or definitively to retain the article for his own purposes.

As a general definition of requisitions in the sense in which this word is used in international law it might, therefore, be said that: requisitions are demands of a belligerent for private property to be used for war purposes. Money alone is excepted from these demands. Sums of money which the belligerent levies in enemy territory which he occupies are called contributions or compulsory imposts.

Accordingly, we are not dealing with requisitions in case a belligerent takes away objects of private ownership, in order to detain them in his keeping for reasons of safeguarding his situation, for instance, when he proceeds to disarm the population or seize armament magazines and war supplies. For in such cases he does not, generally,

¹ See the German Imperial law of June 13, 1873, sec. 4, in reference to war supplies: "In which cases and to what extent the obligations shall have to be met, has to be determined after the requisition of the military authority by ordinance of the competent civil authorities, in accordance with the public law of the land."

make use of these things, but by taking them in his keeping, he means to make sure that they will not be used against him.

With regard to requisitions, we must, furthermore, distinguish as to where such requisitions are made, whether in the territory itself of the belligerent or in the occupied enemy country. Cases of the first kind, as regards probability and scope of such requisitions, are regulated essentially by the State law alone. The belligerent is not sovereign in the occupied enemy territory; he is bound by the law of nations and must be particular in the observance of its rules.

SECTION 3.—REQUISITIONS OF PRIVATE NEUTRAL PROPERTY IN GENERAL.

As regards requisitions of private neutral property, we must according to the accepted law of nations, distinguish three main cases, whose regulation is in part met from different viewpoints, and even the historical development of the rules governing them is not the same.

1. *Requisitions in the territory itself of the belligerent.*—For this case provisions are found in many treaties, and to meet the case, different systems have been resorted to which will be referred to in section 4.

2. *Requisitions in enemy land.*—There is scarcely any contractual law that will meet this case.

Theory and the Second Hague Conference have considered only a special case, namely, the requisition of railway material having its origin in a neutral State, and for this case a regulation has been established by the Second Hague Conference which is valid also in case such a requisition is made in the territory itself of the belligerent.

3. *Requisitions of neutral ships and of their cargoes.*—To meet this case, maritime law has under the name of "*ius angariae*" developed special rules whose origin dates back to Roman law. In former times no distinction was made between requisitions in the territorial sea or in the actual waters of one of the belligerents or upon the high seas. But, as will be shown, it is necessary, according to the present law, to make a distinction according to the place where the requisition is to be made.

For the first and third questions we find a wealth of material in the treaties of commerce, amity, and navigation of which the dogmatics of jurisprudence has not hitherto availed itself. In these treaties we find frequently provisions agreed upon with regard to the extent in which the property of the nationals of the two contracting parties are subject to military requisitions. Such provisions are generally established for peace and war times. According to their phraseology, it can not always be stated with certainty, whether or not they are to prevail even in case war should break out between the contracting States themselves; this, however, might be answered in the negative in most cases. They hold, however, always if one of the contracting powers is involved in a war in which the other one remains neutral. From this there results that for the study of our subject, *requisitions of private property of the nationals of neutral States*, such provisions are of special importance.

PART I

REQUISITIONS OF PRIVATE NEUTRAL PROPERTY IN WARFARE ON LAND.

SECTION 4.—REQUISITIONS IN THE TERRITORY OF A BELLIGERENT STATE.

I. For requisitions of private neutral property within the territory of the belligerent itself, Hall gives the following general rule: "As a state possesses jurisdiction, within the limits which have been indicated, over the person and property of foreigners found upon its lands and waters, the person and property of neutral individuals in a belligerent state is in principle subjected to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the State as the existence of hostilities may render necessary, provided that no further burden is placed upon foreigners than is imposed upon subjects."¹

This idea meets the view which prevails in the literature upon the subject and also the practice of the States. That part of it which might possibly be controverted has to do with the origin of the authority of a State, to make requisitions within its own territory, an authority which he states has its basis in the right of jurisdiction. But, in truth, it has not its source in the sovereignty of the State ("quod est in territorio, est etiam de territorio"). In virtue of this authority, the State, within its own territory, is entitled to take any measures which, for any purpose whatsoever, and especially for the purpose of self-assertion, it may deem necessary.

It has been asserted by many writers² that war taxes may be laid upon the landed property of neutrals in the territory of one of the belligerent parties, that the movable property, however, of nationals of neutral States found within the war zone or within the territory of one of the belligerents, may not be touched, so long as they themselves refrain from participation in warlike operations. This view can, however, not be regarded as tenable. To be sure, there are a number of treaties stipulating something of the kind; but in even a large number of treaties different agreements have been reached, and we find no international arrangement on the basis of which it might be said that the contracting parties consider such a rule as appertaining to the accepted law of nations. From the diversity of the regulations agreed to in the distinct cases, it rather appears that the States act on the basis of the principle put at the head of this paragraph, and were disposed only to mitigate it in one way or another.

¹ Hall, *International Law*, 5th ed., p. 654.

² For instance, by v. König, *Hdb. d. Konsularwesens*, p. 176; Kleen, *Lois et Usages de la Neutralité*, I, p. 147, and II, 60 ff.

II. Treaties directed to that purpose, may be found in large numbers.¹ According to the regulations agreed upon they may be divided into three main groups: (1) Treaties in which the contracting States renounce the recourse to requisitions against neutrals of the other contracting party residing within their territory; (2) treaties according to which requisitions are admissible only in case they appear as taxes connected with the possession of landed property; finally, (3) treaties in which it is agreed that the nationals of the other contracting party are subject to the same taxes as the nationals.

1. Freedom from all requisitions for the nationals of the contracting parties is especially agreed upon in treaties concluded between the German Empire and the Central and South American Republics. To this category of treaties belong those with San Salvador, June 13, 1870, Article 5 (*RGBL.* 1872, p. 280, not now in force); with Costa Rica, May 18, 1875, Article 6 (*RGBL.* 1877, p. 17, not now in force); with San Domingo, January 30, 1885, Article 7 (*RGBL.* 1886, p. 7, not now in force); with Guatemala, September 20, 1887, Article 6 (*RGBL.* 1888, p. 242); with Honduras, December 12, 1886, Article 6 (*RGBL.* 1887, p. 266); with Colombia, July 23, 1892, Article 7 (*RGBL.* 1894, p. 475); with Nicaragua, February 4, 1896, Article 6 (*RGBL.* 1897, p. 175); and finally, with Portugal, March 2, 1872, Article 2 (*RGBL.* 1872, p. 275). The last named provision reads as follows:

The nationals of each of the contracting parties shall, within the territory of the other * * * be free from all war taxes, compulsory loans, military requisitions and contributions of any kind whatever.

Article 7 of the treaty with Colombia of July 23, 1892, is of a similar tenor:

The nationals of one contracting party shall, within the territory of the other party, be free from extraordinary war contributions, compulsory loans * * *.

The other agreements are nearly identic to one another, based upon the following type (Article 5 of the treaty with Salvador, June 13, 1870):

The Salvadorians in Germany and the Germans in Salvador shall be free both from all personal military services * * * and from all extraordinary war contributions, compulsory loans, military requisitions or services of any nature whatever. Furthermore, they may in all cases regarding their movable and immovable property, be subjected to no other burdens, taxes, and contributions other than such as may be required of their own nationals or of the nationals of the most favored nation.

The agreements reached in the treaties with Costa Rica, San Domingo, Guatemala, Honduras, and Nicaragua, to which reference has been made, conform literally or nearly literally, *mutatis mutandis*, to this provision.

The second sentence of the article cited evidently does not refer to requisitions, but to the ordinary taxes and such requisitions of every sort from the private property of the neutrals of both contracting parties are absolutely forbidden. In consequence, the neutrals are also freed from the burden of billetings. This is seen in the fact that quarters for the soldiers are exacted mostly in the form of requisitions (in the narrower sense; see above sec. 2).²

¹ In this place we shall refer preferably to treaties containing provisions anent requisitions; and concluded by the German Empire.

² See the German Imperial law anent war prestations of June 13, 1873, sec. 3, 1. 1.

and in the other fact that, if release from requisitions is agreed upon in a treaty, and the contracting parties mean, nevertheless, to subject their respective subjects to the burden of billeting, this is expressly stated. Thus in the treaty of commerce and navigation with Spain, July 12, 1883, (*RGBl.* 1883, p. 311) Article 6 reads as follows:

The neutrals of each of the high contracting parties shall, within the territory of the other, * * * be free from all * * * military requisitions and services, however they may be called, and which may be imposed for military * * * but *without prejudice* to the obligation to furnish quarters and of other natural services for the armed power, in so far as this obligation is imposed upon the inlanders.

The text of Article 3 of the treaty of commerce concluded between the German Empire and Serbia, August 21/9, 1892 (*RGBl.* 1893, p. 270) is of a similar nature:

The nationals of each of the two contracting parties shall be relieved, within the territory of the other * * * from all military requisitions and services * * * ; but without prejudice to their obligation to furnish quarters and other natural services for the armed power, in so far as such an obligation rests upon the inhabitants and the neutrals of the most favored nation. (According to the additional treaty of November 16/29, 1904, Article 2, I (*RGBl.* 1906, p. 372) the German Imperial nationals in Serbia shall be, as tenants of immovable property, relieved of the obligation to furnish quarters.)

This provision is remarkable in that it establishes at the same time a release of the respective subjects from all military requisitions and services, but recognizes an obligation of the same subjects to furnish, to a certain extent, natural products to the armed power. We are here confronted by a contradiction since requisitions mean demands of natural supplies for the armed power, and thus the second part of the article would annul absolutely the first part. In all probability it was meant that an obligation of the respective nationals should be recognized only in so far as natural supplies are connected with quarters, as is clearly stated in the treaty with Spain just referred to.

From the phraseology of the two conventional provisions we have just discussed, there results that quarters are included in requisitions; for, in the contrary case, the subjection of the respective nationals, in the form of an exception ("without prejudice") of the general rule of freedom from requisitions, would not have been recognized.

This, however, brings us to the conclusion that wherever such an exception is not established the freedom from requisitions also involves a freedom from the burden of quarters.

Agreements according to which the nationals of both contracting parties are to be relieved from all requisitions, are also found in the treaties concluded by the Zollverein with Paraguay, August 1, 1860 (*Preuss. GS.* 1862, p. 102, Art. 12), and with Chile, February 1, 1862 (*Preuss. GS.* 1863, p. 761, Art. 12). While the former has in the meantime been replaced by a mere treaty of most favored nation,¹ the latter has passed over to the German Empire and is still in force.²

¹ Commercial treaty of July 21, 1887 (*RGBl.* 1888, p. 178).

² By the additional treaty of July 14, 1869, this treaty was extended to the Grand Duchies of Mecklenburg, to Lauenburg and Lübeck; on August 27, 1895, it was denounced by the Chilean Government, and in consequence of an explanation of the Chilean Government, and on the basis of an understanding with the German Government, it is indefinitely maintained with the right of a delay of three months within which it may be denounced: *Handelsverträge des Deutschen Reichs*, 1906, p. 83, 84.

2. A second system met with in many treaties is that by which the contracting parties mutually agree, for their respective subjects, to the freedom from all personal burdens, but reserving unto themselves the right to levy such taxes as are connected with the ownership of landed property. Thus, in the treaty with Mexico of December 5, 1882, (*RGBl.* 1883, p. 255), Article 14 reads as follows:

Furthermore, they (that is to say, the nationals of each of the contracting parties) shall be freed from forced loans, as well as from taxes, requisitions and contributions for purposes of a foreign war, in so far as these are not imposed upon immovable property within the country, in which latter case they are to be borne by the nationals of the other party exactly in the same way as by the citizens.

Article 4 of the treaty with Roumania of October 21, 1893 (*RGBl.* 1894, p. 5), excepts—

military services and exactions, which may be required of all inlanders as owners, lessors or lessees of immovable property.

In other treaties, in which even the mere admissibility of such requisitions is determined, requisitions that affect the respective subjects as owners of immovable property, a clause of most favored nations is still added. Thus, in Article 4 of the treaty of the German Empire with Italy of December 6, 1891, (*RGBl.* 1892, p. 100) we read:

The nationals of each of the contracting parties shall, within the territory of the other, be freed from all military requisitions and services * * * ; with the exception, however, of * * * the military services and requisitions that may be imposed upon the inlanders and the nationals of the most favored nation as owners or lessees of immovable property.

Like unto this phraseology is that of Article 5 of the treaty with Bulgaria of August 1, 1905 (*RGBl.* 1906, p. 6).

In the treaty of the German Empire with Russia of February 10/January 29, 1894, Article 3 (*RGBl.* 1894, p. 156) only the admissibility of billetings and the imposition of special taxes is recognized.

The nationals of each of the contracting parties * * * remain * * * free * * * from * * * military requisitions * * * ; excepted from this are * * * the obligation to furnish quarters and other special services for the armed power such as are imposed upon the inlanders and upon the nationals of the most favored nation as owners, lessors, or lessees of immovable property.

The subjects of the co-contractants may, therefore, not be taxed higher than the inlanders. According to the clause of the most favored nation they shall still be entitled to those privileges which one of the States grants to another third Power. If, therefore, one of the contracting parties insures to the nationals of another State unrestricted freedom from all requisitions, he would have to grant the same freedom to the nationals of the other contracting State. We have seen that in a number of treaties the German Empire has insured to the nationals of other States full and unconditional freedom from military services in case of war. These favors, therefore, are to be granted likewise to the nationals of those States with which the clause of the most favored nation has been agreed upon.

This also applies to the treaty discussed hereinbefore and concluded with Serbia, August 21/9, 1892, Article III (*RGBl.* 1893, p. 271), in which such a clause of the most favored nation has also been agreed upon.

3. In many treaties it is merely declared that the respective nationals, with regard to the matter of requisitions, are to be treated exactly as the inlanders. Thus, Article 4 of the treaty between Germany and Sweden of May 8, 1906, (*RGBl.* 1906, p. 742) reads as follows:

They (that is to say, the nationals of the one contracting party who sojourn or have taken up their domicile within the territory of the other party) shall not be subject

to any other military services and requisitions in peace times and in war times than those to which the inlanders are subject, and the nationals of the two parties shall be mutually entitled to damages such as are determined in favor of the inlanders of the two countries according to the laws therein in force.

Literally in agreement with this provision is Article 1, I, paragraph 2, of the additional treaty to the commercial treaty of December 6, 1891, between the German Empire and Belgium of June 22, 1904 (*RGBl.* 1905, p. 600).

Mention should also be made here of the treaty between the German Empire and Greece of July 9/June 27, 1884, with its Article 5 (*RGBl.* 1885, p. 26), which also contains a clause of the most favored nation:

The nationals of each of the two high contracting parties shall be freed within the territory of the other party * * * from all military requisitions and services. * * * ; excepting therefrom, however, * * * military services and requisitions that may be required of the inlanders and of the nationals of the most favored nation.

This, therefore, also admits that the nationals of the two contracting parties like unto the inlanders may be subject to requisitions. The scope of the clause of the most favored nation is the same as in the case of the treaties already referred to.

III. From what we have said so far there results that no unilateral regulation has been effected through the treaties. Yet, it is possible to ascertain from them the legal viewpoints of the States, if we will bear in mind the following considerations: it is very improbable that in a treaty heavier burdens are imposed for the nationals of the respective States; than those which they might impose in any event in accordance with the law of nations; as represented by the views of the States. All the conventional agreements to which reference has been made show clearly the effort to protect the property of the respective nationals and to improve its legal status. Hence, it must be admitted that the treaties stipulating the widest subjection to requisitions of the private property of the nationals of the co-contractants, are also intimately bound up with the apprehension of international law by the States. This applies to the treaties with Belgium and with Sweden referred to under 3, and according to which the nationals of the contracting Powers may be subjected by the co-contractant, and to the same extent, to requisitions even as the inlanders themselves, and are only entitled to damages to the same extent as the latter. But it cannot be ascertained from these conventional provisions how far, according to the apprehension of the States, the accepted general international law may possibly discriminate against foreigners. It seems, however, that these conventional provisions conform precisely to the accepted law of nations and possess only a declaratory importance in that they were, accordingly, only agreed upon in order expressly to determine the accepted right, and hence, to create, for the application of the latter, an absolutely certain and firm basis. This assumption would meet the opinion generally accepted in the doctrine of international law and the principle of Hall placed at the head of this paragraph.

The German law of June 13, 1873, concerning prestations for the armed forces in war is silent upon the question of the nationality of those subject to requisitions, and seems, therefore, to apply equally

to inlanders and foreigners by imposing upon and entitling both to the same duties and the same rights.

This argument refutes, therefore, the opinion of Kleen and of von König which we had already considered as untenable. That opinion does not conform to the accepted law of nations and not even to the regulation agreed upon in most of the treaties.

We shall still have to consider the legal status of such neutral property whose owners have no domicile within the territory of the belligerent State, nor reside therein, therefore, of property which is merely in transit or has momentarily come into the country of the belligerent. The treaties we have already discussed contain no reference whatever to such property. What they determine is as follows: the nationals of one of the contracting parties may be subject to no requisitions within the territory of the other party, etc.; it is, therefore, presumed that the owners of the foreign State can be reached, that they dwell within the territory of the respective State or at least reside within it. It is nowhere stated: the property of the nationals of one of the contracting parties remains free to this or to that extent from requisitions, within the territory of the other party. This latter conception would be the more inclusive one: it would include all cases in which it would be possible for a State to requisition neutral property; this is not so in the former conception which is generally adopted. If now we inquire into the legal status of this property which by chance has come into the power of the belligerent, it appears indeed certain, that it cannot be a status less advantageous than that of the property of such private neutral persons as permanently reside within the territory of the respective State. For the immunities granted to such persons must first of all be granted to those neutrals residing within their own native country or within some other neutral State and not even connected with that foreign State either through domicile or through industrial pursuits. It is difficult to say what the practice of the rules of war will be in such cases and if it will accord a more favorable treatment; up to the present time that practice has not given these cases any particular attention. For a special case, that is to say for the requisition of neutral railway cars for the purpose of transporting troops, the Fifth Convention of the Second Hague Peace Conference has adopted a regulation based on stricter basic principles than are ordinarily resorted to in making requisitions. Whether or not, and in how far it may be permitted to draw from this provision, by analogy, inductions for the law of nations, will be discussed in our section 16.

SECTION 5.—REQUISITIONS WITHIN OCCUPIED ENEMY TERRITORY.

I. The treaties we have discussed so far do not bear upon requisitions of neutral property within occupied enemy national territory. They read as a rule: the nationals of each of the contracting States remain free, etc., within the territory of *the other party*. Nor are there any other international treaties which deal specifically with this matter.

From the practice of the rules of war, Halleck-Baker presents the following as to the view of the English Government with regard to this question during the Franco-German war of 1870-71:

With respect to the rights of neutral individuals residing in a belligerent territory in 1870, during the Franco-German war, the British law offices were of opinion that British subjects having property in France were not entitled to any special protection for their property, or an exemption from military contributions to which they might be liable in common with the inhabitants of the place in which they resided, or in which their property might be situated.¹

Accordingly the private property of neutrals in the enemy territory occupied by a belligerent may be requisitioned to the same extent as the property of the nationals of the State against which war is being waged. Private neutral persons may not demand that special consideration, or a privileged status as compared with the natives should be granted the property by the belligerent, for the mere reason that they are not nationals of the enemy State. Halleck-Baker¹ cites two other cases in which English subjects complained to the English Government because, although the English flag was flying over their houses, no consideration was paid to it by the Prussian troops, and billetings were assigned to their houses, so that the flag had not protected their property. In both cases, in accordance with the view of its juridical advisers, the English Government replied that, although the neutral flag had not been respected by the Germans, it was unable to make formal protest to the Prussian Government. Only in case of unnecessary acts of violence could such protest be officially made to the German Government, in the hope that the latter would find it proper, from consideration of fairness, to grant compensation. This view has its basis in the fact that unnecessary acts of violation constitute a violation of international law for which the State might be held responsible.²

From the report just referred to there results furthermore that even the German authorities must have been of opinion that property of the nationals of a neutral State within enemy country could not claim greater consideration than that of the natives; for the parties interested, as we have seen, complained that the English flag which they had flown had afforded them no protection.

From the experiences of later wars, no cases have arisen that are pertinent to the present discussion. The affair of the Transvaal railway, which seems to have been a private Dutch undertaking, is different. The question involved was not as to whether or not England was justified to use the cars for the needs of waging war, but, whether or not she was justified to nationalize the railway by paying a smaller indemnification than had been foreseen in the treaty with the Transvaal.³

With regard to our problem, The Hague Conference has adopted no specific regulation. But the phraseology of one provision seems to indicate that, according to the opinion of the Conference, neutral property within enemy country is, even as the property of the nationals of the enemy State, subject to requisition in accordance with the usual basic principles. This will be found in Article 19 of the

¹ *International law*, 4th ed., vol. ii, p. 164, Note 1.

² This is now expressly stipulated in Article 3 of the Hague Convention respecting the rules of war on land.

³ See, Kaufmann, *Zur Transvaalbahnfrage*.

convention anent the rights and duties of neutral powers and persons. Its introductory words read as follows:

Railroad material coming from the territory of a neutral power * * * may be requisitioned and used only in case of and to the extent in which an imperative necessity may call for such action.¹

It is not stated:

Railway material belonging to neutral Powers, to private neutral persons or to neutral societies * * *.

Rather for the higher protection granted by Article 19, it is stated as essential that the railway material belongs to a neutral *territory*, that it is regularly used within such territory. Railway material belonging to a railway company exploited within the territory of the State against which war is being waged, would not come under this provision, not even if it belonged to private neutral persons and companies. Such an enterprise would better be classified under Article 53 of the rules of war on land. From this it will be seen that in this respect at least, the Conference recognized, for requisitions, a territorial principle, and not a principle of nationality.

In the literature dealing with this matter the opinion is general that the belligerent may treat neutral property in enemy country on a par with that of the nationals of the State against which war is being waged,² that, therefore, requisitions of goods of the nationals of neutral States are admissible on the same conditions as are requisitions of private enemy property.

Therefore, the same principles governing requisitions in occupied enemy territory apply to requisitions of neutral property. Fundamental in this respect are Articles 52, 53, of the rules of war on land elaborated by the Second Hague Conference. Of course, these rules of war are not to be regarded as an absolute law, for the reason that they declare only an obligation on the part of the States, in a given case, to prescribe rules of conduct for the armies as will be conformable to the rules of war.³ But in view of the fact that all important powers have agreed to such an obligation, The Hague rules of war on land will find their application in nearly every future war.

In the next place and according to Article 52 of the rules of war on land it is admissible on principle that contributions of natural products and services may be exacted from the communities or from their inhabitants. As regards the extent to which such requisitions may be demanded, Article 52 establishes the "needs of the army of occupation" as a criterion. It may be asked if this expression was a happy choice. From the protocols of the First Hague Conference⁴ it appears that this expression was chosen instead of the more indefinite "*nécessités de la guerre*" of the Brussels Article 40. It was intended to make clear that the *nécessité* which is to be the criterion, should be "*celle de l'entretien de l'armée d'occupation.*"

¹ *RGBl.* 1910, p. 173.

² See Lueder, in Holtzendorff's *Handbuch*, IV, sec. 117; Geffcken in Heffter's *Völkerrecht*, 8th ed., p. 335; Liszt, *Völkerrecht*, 1911, p. 308; Pillet, *Les lois actuelles de la guerre*, 1898, No. 158; Nys, *Le droit international*, II, p. 383; Hall, *International Law*, 5th ed., p. 654; Rivier, *Lehrbuch*, 2nd ed., 1899, p. 391; v. Maritz, *Völkerrecht*, in Hinneberg's *Kultur der Gegenwart*, II, 8 (*Systematische Rechtswissenschaft*), 1906, p. 473; Féraud Giraud, *Recours*, p. 42; Bonfils, *Droit International Public*, 5th ed., sec. 1217.

³ Convention respecting the laws and customs of war on land, Article 1 (*RGBl.* 1910, p. 124).

⁴ Annexe au Procès-Verbal de la Séance du 5 juillet: Rapport présenté par Rolin (*MNRG.* 2, XXVI, p. 469).

If the words chosen to express this idea were to be strictly interpreted, a belligerent would be forbidden to requisition objects needed in hospitals, or explosives, or means of conveyance not included in Article 53 of the rules of war on land. It is to be doubted that this was really intended. A little further on there is to be found a definition of requisition as "réquisition d'objets déterminés, entre les mains de ceux qui les possèdent, soit pour en faire un usage temporaire, soit pour les consommer."¹ Objects, however, whose mere use is required for the maintenance of the troops, could not readily be found.² Therefore, the expression "pour les besoins de l'armée d'occupation" must not be interpreted literally and we must regard requisitions of articles of the kind indicated above, if they are necessary in war, as admissible. It will have to be granted that among such articles we must include those which may be used for the maintenance of the troops, as well as such others as may be required for the needs of waging war by the army of occupation.

The limit of the admissibility of requisitions, even as that of all war measures, is found in the idea of military necessity. Requisitions are always inadmissible if they are not required by the needs of war.

Article 52 of the rules of war on land further demands that the services exacted shall be proportionate to the resources of the country.

Nor may they contain, so far as the population is concerned, the obligation that they are to take part in the war operations against their own country. To be sure, this matter is never considered in connection with requisitions; for requisitions are demands for material goods and not for personal services, and they cannot therefore contain any obligation to take part in hostilities.

Requisitions can be exacted only with the authorization of the commander of the locality occupied.

Requisitions, as far as possible, should be paid for in cash; in the contrary case receipts are to be issued which should be redeemed in cash as soon as possible. If, however, no payment is made before the conclusion of peace, and in case the treaty of peace contains no provision with regard to the obligation to redeem receipts, then the situation of the owner of a receipt is very precarious, even in case he is a national of a neutral State. For international law contains no rule as to who shall redeem receipts for given requisitions. At the First Hague Conference, and in connection with the discussion of the article anent the rules of war on land which deals with requisitions, Swiss proposals, according to which a claim of the person subject to requisitions should be allowed, were rejected on the ground that one could not establish in an international agreement that a State could assume an obligation towards its subjects (*MNGR.* 2, XXVI, p. 578 ff.). Both the German Government and a majority of the German publicists have always taken the view that the State within whose territory the requisitions are made, is obligated to that end.³ The French, on the other hand, have asserted that the State making the requisitions is obligated to make payment therefor.

¹ See the preceding note.

² At most we might think of the matter of billetings; but even then it can be said that the use of the houses serves for the maintenance of the troops. This also would be a somewhat forced interpretation.

³ Bismarck took this view on the occasion of the Duclair Affair (*Staatsarchiv*, XX, No. 4500).

After the war of 1870-71, the French Government made, to be sure, partial payment for requisitions made by the Germans in France, but it expressly declared that it did not hold itself obligated to do so. The newer doctrine has expressed the individual opinion that the treaty of peace must contain provisions with regard to this matter; but if it had been intended that this should be done, The Hague Conference would certainly have adopted an express provision to that effect.

According to Article 53, II, of the rules of war on land, "all means which by land, by water and by air serve for the transmittal of news and the transportation of persons" are subject to a separate treatment. Such means may be "seized," but upon the conclusion of peace they must be returned and compensation for their detention settled. It is not quite clear what relation this article bears to the preceding one. Does this merely recognize (on account of the expression "seized"), that the belligerent may put such "means" under his control and care, and must all individual uses thereof for purposes of war be effected as requisitions according to Article 52? This may indeed be presumed. Rather, the belligerent will be permitted to use all articles which he needs, and at the conclusion of the peace compensation as a whole must be made for the losses occasioned to the owners in the course of the war. It is not stated which party shall have to do so; but the text of the article indicates that provisions are to be made with regard to this matter in the treaty of peace. All cases coming within the field of maritime law, and therefore especially requisition of neutral vessels are excluded from the regulation of Article 53. Requisition of hostile vessels cannot, therefore, as a rule, be brought into discussion because this matter comes within the field of the prize law.

II. There is a great difference of opinion as to how this authority of a State to make requisitions in enemy country is to be justified in theory and what its "base juridique" is.

The ancient theory did not distinguish between military occupation and conquest of a country; it assumed that the occupied territory could not be transformed into national territory, and its population, without further ado, made into subjects of the victor. If this is admitted, requisitions are then simply an exercise of the power wielded by the victor and have nothing to do with international law. But to-day this theory can no longer be admitted as being correct. According to the present day conception, conquest is a fact only after the particular country has been transferred by the treaty of peace or in case of a *debellatio*. Until either the one or the other of these two situations has arisen, there is only a military occupation (*occupation* in contradistinction to *conquest*), and the population does not change its nationality. This is also the view taken by the German Government in the war of 1870-71, when it permitted in Alsace-Lorraine, which was not to be returned to France, elections to the French National Assembly, which was to decide with regard to the treaty of peace. Hence, the people of Alsace-Lorraine were still being treated as French nationals.

In a few instances, some recent writers have contended that, as a result of military occupation of enemy territory, the supreme power of the conquered within this territory passes to the belligerent.¹ It

¹ Morin, *Les lois relatives à la guerre*, Paris, 1872, vol. I, p. 384 ff., especially p. 390.

was inferred from this, that, therefore, the belligerent was justified in making requisitions only in so far as the laws of the country against which war is being waged admit of such authority, and that requisitions are inadmissible, in so far as the State whose territory is occupied does not, according to its legislation, possess such an authority toward its subjects. This theory fails, however, to consider the nature of the *occupatio bellica* as an extension of the supreme power of the belligerent to the enemy territory, in so far as the interests involved in the waging of the war require this extension. Within the occupied territory the belligerent possesses an authority by virtue of his own and not by virtue of a derived right, and the legitimacy of this authority is found in the fact that international law sanctions such an extension of his power to the occupied territory.

Another theory which has likewise been advanced by French writers in order to show the illegality of the practice resorted to by the Germans in 1870-71 declares that no legal basis can be found for the justification of requisitions.¹ But according to universal international practice, requisitions are regarded as admissible, and this admissibility has been also confirmed by the Hague Conference. The assertion, however, that there is no juridical basis for the justification of requisitions fails to consider the real conditions.

Many writers assume that the "droit de la nécessité" is the juridical basis for requisitions.² Such a right of necessity had already been stated by Hugo Grotius³ and Vattel.⁴ Even this theory does not fully agree with the prevailing law. According to the Hague rules of war on land, requisitions can always be made "pour les besoins de l'armée." It is, therefore, not at all necessary that a body of troops should suffer hunger; even in case supplies from the homeland did not reach the troops in due time or in sufficient quantities, the belligerent may resort to requisitions, if he deems it proper to do so. This theory regards as an actual right that which the mind's eye beholds as an ideal.

If we examine closely the matter of the legal basis for requisitions within occupied enemy territory, it will be found necessary to distinguish between two different relations: (1) the relation between the belligerent States, or in other words, the question as to why a belligerent may proceed to make requisitions within enemy national territory; (2) the relation between the belligerent and the private individual whose property he requisitions, or in other words the question as to why he may requisition private property for war purposes.

The answer to the first question will be found only in the conception of war necessity. "Omnia licere in bello quæ necessaria sunt ad finem belli," so states Grotius. All acts are permitted the belligerent if they serve to attain the object of the war, and if they are demanded by military necessity, and do not represent unnecessary acts of violence, provided international law does not set limits thereto; in so far as the belligerent is concerned. Only in case, and in so far as it is necessary for military operations, the belligerent may requisition in enemy land. This conception of military necessity is absolutely different from the necessity had in mind by the advocates of the

¹ See, for instance, Funck-Brentano et Sorel, *Précis du droit des gens*, 1877, p. 281.

² Pillet, *Les lois actuelles de la guerre*, 1898, No. 152; Nys, *Le droit international*, III, p. 383, and still others.

³ *De iure ac pacis*, II, 2, § 6 ff. and III, 17.

⁴ *Droit des gens*, II, ch. 9, secs. 119, 121.

droit de la nécessité. For this latter *nécessité* the presence of some condition of distress is always required, either that the troops are in danger of suffering from hunger, or that the State finds itself in some desperate situation. Military necessity for any act whatever exists even when it is of such a nature as will further insure and facilitate the operations of the army.

Since in war two States have entrusted the decision of their differences to military forces, neither of them can complain if the opponent resorts to all those measures which he regards as militarily necessary. Accordingly, if he considers requisitions in enemy territory as commanded by war necessity, they are for that reason sufficiently justified with regard to the State against which war is being waged.

Efforts have been made to justify requisitions in enemy territory through the maxim: "*La guerre doit nourrir la guerre.*" But this expression means nothing more than that the belligerent is not obligated to carry on war with supplies furnished by himself, but that he may have recourse to the resources of the occupied enemy territory. The expression is of importance with regard to the right of levying monetary contributions which may not be imposed merely according to the military needs. It is not, however, proper to use it in order to support the theory of the legal principles concerning requisitions. For it gives no criterion as to the extent in which these requisitions may be exacted. If it were really suitable for the law of requisitions, then, by way of example, requisitions of valuable objects which the belligerent desires to sell to secure help in meeting the expenses of the war, would have to be regarded as admissible. But this is not so. Military need alone is required to justify requisitions; these are only admissible "*pour les besoins de l'armée occupante.*"

How are we to explain the relation between the belligerent and the private individual whose property is requisitioned? War necessity does not suffice to justify the act. For war is being waged between one State and another State, and not between one State and the subjects of the other State. But through the military occupation of the enemy territory the supreme power of the enemy State is suspended, and in its place appears the power of the belligerent exercised by the occupying troops; but this power is restricted, in view of the fact that it may be exercised only in so far as the needs of the war may demand. In virtue of this power the belligerents are entitled to issue directions for the occupied territory and its inhabitants. All persons and things within the occupied territory are subject to these directions. If now, a belligerent issues an order according to which certain objects from within the occupied territory are to be supplied for war purposes, the legal obligation of the inhabitants to furnish such supplies is thereby established; there is no need for any further reason for this obligation; it would be as idle for a jurist to attempt to discover any such further reasons than if he were seeking to find in the domestic public law a special reason for the obligation of paying taxes. In both cases the duly promulgated national ordinance is the legal basis for the obligation. But as the sphere of activity of the power of the belligerent which has been extended to the occupied territory is of a territorial, and not merely personal nature (directed toward the nationals of the enemy State), it follows that all that

which is found within that territory is subject to it, both the nationals of the enemy and the citizens of a neutral State, both the objects belonging to enemy subjects and those belonging to neutral persons. That is the juridical explanation with regard to the obligation of even neutral private persons when properly ordered to do so, to place their property at the disposal of the belligerent. Through their sojourn within that territory they are, even as the nationals of the enemy States, *subditi temporarii* of the power exercised by the belligerent within the occupied territory, and, therefore, likewise subject to his directions.

PART II.

REQUISITIONS OF NEUTRAL MEANS OF TRANSPORTATION.

SECTION 6.—REQUISITIONS OF NEUTRAL RAILWAY MATERIAL.

Special principles have been adopted by the two Hague Conferences with regard to neutral railway material. In the rules of war on land worked out by the first conference we find the following provision:

Article 54. Railway material which has its origin in neutral States, whether belonging to the States themselves, or to companies, or to private individuals, shall be returned to them as soon as possible.¹

The initiative for this article came from the Belgian delegate Beernaert and the Luxemburg delegate Eyschen. But their proposal was to a considerable extent different from the phraseology which was subsequently adopted. The article proposed by Mr. Beernaert had this further addition: "sans pouvoir être utilisé les opérations militaires."² In opposition to this proposal, the German delegate Gross von Schwarzhoff stated that such a sharp and exact provision would tend to increase rather than to avoid difficulties. The proposal was, therefore, referred to the Editorial Committee of the second subcommission,³ which accepted the view of the German delegate and expunged the concluding words of the Beernaert proposal. In this shortened form, the article was then unanimously adopted in the eleventh meeting of the second subcommission. The provision thus adopted cannot be said to have been a very happy one; it was altogether too vague and indefinite. It had been merely the intention of the commission "de faire ressortir que le matériel des neutres ne saurait être l'objet d'une saisie comme celui des belligérants."⁴ But, in the approved phraseology, this is not expressed with sufficient precision. Furthermore, the position of the article in section 3 of the rules of war on land was not a happy one, for this section deals with the *autorité militaire sur le territoire de l'Etat ennemi*; for it could be inferred from this that the provision which had been adopted should be applicable only in the case of requisitions of neutral railway material within the occupied enemy territory.

The Second Hague Conference also discussed the matter of neutral railway material. It has worked out some precise rules and put the entire provision into the Convention concerning neutral powers and persons in case of war on land. This was necessary for the reason that the articles were to be applied both to requisitions in the home country and in the territory of the enemy State. Accordingly the following was agreed upon:

ARTICLE 19. Railway material coming from the territory of a neutral power and either belonging to this Power, or to companies or to private persons, and recognizable

¹ *RGBl.* 1901, p. 452.

² *MNRG.* 2, XXVI, p. 517.

³ *Ibid.*, p. 608.

⁴ Report of the 2nd subcommission: Annexe I au Procès-Verbal de la Séance du 5 juillet, No. 5 (*MNRG.* 2, XXVI, p. 74).

as such, may be requisitioned and used by a belligerent only in case and to the extent of which such action is demanded through imperative necessity. As soon as possible it must be returned to the country of its origin.

In like manner, and in case of necessity, the neutral power may detain and use to the same extent, material coming from the territory of the belligerent power.

On the one and on the other part an indemnification shall be paid according to the amount of the material used and the duration of such use.¹

The remarkable thing about all this is that the conditions under which requisitions of neutral railway material are made, are much stricter than those applying to ordinary requisitions. Ordinary requisitions may always be resorted to for the needs of the army or for the conduct of the war. International law puts a limit to the discretion of the belligerent only in so far as it forbids abuses, and especially monetary gain. But in the matter which we are discussing, his authority is restricted in that he may use neutral railway material only in case and in so far as an imperative necessity may require. This positively requires a pressing need on the part of the belligerent. He need not, of course, be confronted by a necessity in the technical sense; there need be no immediate danger to his troops or to his military operations. In case he were planning a surprise attack or could not fully carry out that plan without using the available neutral railway material, we would have to regard such a situation as one of "imperative necessity."

The article is also important in that the neutral power is entitled, because of the material used by the belligerent, to an equivalent use of such material coming from the territory of the belligerent State, that is to say, by analogy with cases in civil law to a sort of squaring of accounts, when confronted by a case of necessity: in other words, when he begins to feel the dearth of the material requisitioned by the belligerent. The use of railway material on the part of the neutral power can be effected, in case such material belongs to the belligerent State itself, or to private companies, or private persons, provided that it comes from the territory of the belligerent. Such seizure by the neutral power may be operated in the interest of its own railway enterprise, as well as in the interest of private enterprises that are being exploited within its territory. As for the use of railway material, a proper compensation is to be made by both parties. This also is a departure from the rules, for ordinarily the amount of the indemnification and the question as to whether or not such indemnification is made at all in the case of requisitions exacted in the territory of the belligerent himself, would in this case be determined by the law of the State with which international law would in no way conflict, provided that the principle of equal treatment of nationals or foreigners, laid down in section 4, is preserved. In the case of requisitions made in occupied enemy territory, Article 53, 2d paragraph, of the rules of war on land would have to be applied, and according to this article, indemnification shall be settled at the time of the conclusion of peace.

On the other hand, no time is fixed when such claims for indemnification are to be paid. Hence, it will not be inferred that such payment is to be made by the belligerent who has used the railway material, whenever the obligation to return the equivalent has been established both on principle and as concerns the amount to be so

¹ *RGBl.* 1910, p. 171.

paid, due regard being had for compensations which the belligerent may claim for the possible use the neutral may have made of his (the belligerent's) railway material.

REQUISITIONS OF NEUTRAL MERCHANT SHIPS (IUS ANGARIAE).

SECTION 7.—HISTORICAL BASES FOR THE IUS ANGARIAE.

Requisitions of ships are also possible in war and may be even necessary under circumstances and in land warfare. For instance, the belligerent intends to occupy an island belonging to the enemy State; he must then transport his troops across, or he needs ships in order to blockade a watercourse by sinking them at its mouth, etc.

In theory and in practice, there has been developed with regard to requisitions of ships, and especially of neutral private ships, a special legal institution to which different names have been given: *praestationes navium*, embargo, etc., but generally it is called *ius angariae* (*droit d'angarie*, right of angary). As to the origin of this right, international law, as a rule, gives us but aphoristic and indefinite data,¹ and yet, its history can be rather accurately traced from antiquity down to our times. This will form the object of that which follows:

The development and evolution of *ius angariae* in international law are connected with certain legal principles that were established in Rome with regard to the right of dealing in grain. The poorer people of Rome, as is well known, were fed through public supplies of corn at the cost of the State. The grain necessary for that purpose was secured as a tribute from the lands that were subjected. Africa and Egypt, as we know, were the corn granaries of Rome. A special organized guild called the *corpus naviculariorum*,² attended to the transportation across the sea.

It happened, however, that this *corpus naviculariorum* did not suffice to look after this matter, or else a sudden pressing need for ships was made in the imperial rescripts and constitutions, and the legal principles which were hereby established, formed in the sixteenth century, the basis upon which the *ius angariae* was developed.

The main source for these legal principles is Title 11, 4, of the *Codex Just.*; apart from this source, there are still other legal principles relating to this matter, and they are found in the Digest. The provisions of the Codex read as follows (C. 11, 4, 1):

Multi naves suas diversorum nominibus et titulis tumentur. Cui fraudi obviantes praecipimus, ut, si quidam evitacionem publicae necessitatibus tantum crediderit, apponendum, sciat navem esse fisco sociandam. Nam ut privatos quoque non prohibemus habere navigia, ita fraudi locum esse non simimus, cum omnes in commune, si necessitas exegerit, conveniat utilitatibus publicis oboedire et subvectionem sine dignitatis privilegio celebrare. (Translation: Many protect their ships under the names and titles of others. Obviating this fraud we decree that, if any one for the avoidance of public necessity should think that he could attach some other designation to it, he should know that the ships may be subjoined to the fisco. For as we do not prevent private individuals from having vessels, thus we do not allow room for

¹ It is particularly interesting to see what Halleck-Baker (*International Law*, 4th ed., Vol. I, p. 520), says, to the effect that an allusion is made to the *ius angariae* in the gospel of St. Matthew, V, 41.

² See in this connection Lebhardt, *Studien über das Verpflegungswesen von Rom und Konstantinopel* (Dorpat, 1881), p. 16 f.

fraud, since it befits all in common, if necessity requires it, to obey public necessities and to practice navigation without the privilege of the dignity belonging thereto.)

(C. 11, 4, 2):

Jubemus nullam navem ultra duorum millium modiorum capacem ante felicem embolam vel publicarum specierum transvectionem aut privilegiis dignitatis aut religionis intuitu aut præerofativa personae publicis utilitatibus excusari posse substractam, nec si caeleste contra proferatur oraculum sive adonatio sit sive divina pragmatica, providentissimæ legis regulas expugnare debet. Quod etiam in omnibus causis cuivis observari, ut generaliter si quid eius modi contra ius vel utilitatem publicam in quolibet negotio preferatur, non valeat. Quidquid enim in fraudem istius legis quolibet modo fuerit attemptatum, id navigii, quod excusator, publicatione corrigimus. (Translation: We command that no ship with a capacity beyond 2,000 bushels can be permitted to be withdrawn from public utilities before successful loading or transportation of public goods, either through the privileges of rank, or by religious scruples, or personal prerogatives of any private individual, nor must it be permitted to overcome the rules of the most provident law that some heavenly oracle be brought forward or some warning or divine practice. This we desire to be observed also in all other naval affairs, so that it may have no standing if anything of the kind should be attempted in whatsoever business against law and justice or against public advantage. For whatever may have been attempted in any way to the prejudice of that law, we correct by publication, that naval business may be excused.)

The conclusion to the first of these two quotations is especially important:

cum omnes in commune, si necessitas exegerit, conveniat utilitatibus publicis oboedire et subvectionem sine dignitatis privilegio celebrare.

From this it will be seen that according to Roman law, all owners of ships, in the case of necessity, were subject to the obligation to place their ships at the disposal of the public authority to facilitate the importation of grain. It cannot be ascertained from the sources that private ships could be seized for the other, that is to say for military transportation service. Rather, from the entire connection between the constitutions quoted—the two titles which precede Title 11, 4, of the *Codex Just.* and dealing with the origin of the guilds which by occupation attend to the transportation of grains—as well as from attached passages of the articles which we have quoted (—“*et subvectionem sine dignitatis privilegio celebrare;*” “*vel publicarum specierum transvectionem*—”), that they bear only upon the law controlling the supply of grains. Usually the transportation of grain was in the hands of the *corpus naviculariorum*. The case of necessity when private ships could also be compelled to perform such service arose, therefore, only when this guild was unable to meet the necessity, either for want of ships, or because at a given moment public ships for the transportation of grain were not available.

Services accepted from private ships in these circumstances were not called *angariae* by the Romans. *Angariae* or *angaria*, in the *Corpus juris* are rather statute labor with teams, compulsory furnishing of teams for the transportation of things and persons in affairs of the State.¹ In the Latin language wagons were also designated by that same term, that is to say wagons used for the transportation of fiscal goods or accompanying the armies for the accommodation of the sick. And, finally, *angariae* denoted also draft animals that were provided for such purposes by the owners of land by reason of an easement on such land.² From this it appears that *angariae* in

¹ See Heumann-Seckel, *Handlexikon*, 9th ed. 1907: look for these words and the passages quoted therein from the *Corpus juris civilis*.

² Pauly-Wissowa, *Realencyklopädie*; see the words *angaria* and *angarium*.

Roman law did not belong to maritime law, but to that which might be called the law of postal administration. Therefore, such passages of the Roman law as speak of *angariae* do not refer to special prestations. When "*agminales equi vel mulae et angariae atque veredi* (draft horses or mules and minute couriers and vessels and post horses) are referred to in D. 50, 4, 18, 21, as *munera patrimonialia*, it is certain that draft animals are referred to in the latter expression. Therefore, the sentence with which Arcadius Charisius continues in the same place: *Huius modi igitur obsequiae et hi, qui neque municipales neque incolae sunt, agnoscere coguntur* (of this kind, then, are the practices, and those who are neither citizens nor inhabitants must recognize them) does not apply to ships, but only to the law of postal administration. In the Roman law it denotes nothing else than the fact that statute labor and impressing of teams must be supplied by the owners of parcels of ground thus burdened, when such owners are not citizens of the respective municipalities or when they do not dwell upon the particular parcel of land. It is important that this should be borne in mind; for later writers upon maritime law rested their arguments upon this passage when they attempted to justify the admissibility of seizure of neutral private ships for use in the interest of a belligerent State.

When examined from the viewpoint of its origin, the word *angaria* denotes an ordinance relating to the ancient postal service. Herodotus reports (VIII, 98), that the Persians used the word *ἀγγαρχίον* to denote the function of their royal post couriers. But subsequently, the meaning of the verb *angariare* seems to have been widened in its meaning to "force, to seize for compulsory service." In this sense it is also used with regard to the service of ships: thus, in D. 49, 18, 4, 1: *Sed et naves eorum* (sc. *veteranorum*) *angariari posse Aelio Firmo et Antonino Claro veteranis rescriptum est* (but that also the ships of those, that is to say, the ancients) could be attached, as reported by the ancient Aelius Firmus and Antonino Clarus.

At all events in medieval Latin *angariae* referred likewise to statute labor and impressing of teams, etc., especially for postal purposes. On the other hand, the seizure and use of ships for transportation purposes was called *navium praestationes*.

It may, therefore, be said that Roman law did not know a *ius angariae* or a *ius angariarum*. In the Roman law we meet, to be sure, with legal principles referring to the performance of transport service by ships. But they refer only to transports intended for the supply of the necessities of life, and especially of Rome. Furthermore, these legal principles are not of an international nature. Apart from the fact that antiquity knew nothing of an international law in the sense in which the modern world uses that term, those legal principles referred merely to domestic affairs; and since the Roman Empire included all of the Mediterranean countries and controlled all navigation upon the Mediterranean, therefore, that obligation rested likewise upon all places subject to Rome. The *angariae* appertained to the postal administration and had nothing to do with maritime law.

For the further development of this study, the constitution of Emperor Frederick I of 1158, which presented a category of *regalia* for Italy, is of the highest importance. Among other things that we find herein classified as *Regalia: Angariarum et parangariarum et plaustorum et navium praestationes* (Exactions of courier vessels

and auxiliary vessels and of vehicles and ships). Here can clearly be seen the difference between *prestationes navium* and *prestationes angariarum*, etc. The latter again represent statute labor and do not appertain to maritime law, but for our subject, the declaration of regalia of the *navium prestationes* is of importance.

The *Constitutio de regalibus* was included in the *Libri feudorum* (II Feud. 56) and with the latter accepted in Germany. But also in England and in France, the idea that *prestationes navium* are regalia was accepted, but in a specially designated way. For while in the beginning the *iura regalia* appertained to the German king as the supreme bearer of temporal power, it is subsequently regarded as the attribute of sovereignty. Many later writers upon the subject of maritime law still hold to the same view.

SECTION 8.—THE IUS ANGARIAE IN ITS LATER FORM.

The development of the *ius angariae*, as of most of the principles of international maritime law, has taken place since the dawn of modern times. After the new parts of the world had been discovered and a lively rivalry had arisen between the western European States for the possession of colonies, it became especially important for the interested Power to secure ocean-faring ships. These were used for the outfitting of expeditions, for the discovery of new territories, or to wage war against competing Powers. This led to the development of all those principles coming under the widest interpretation of the idea of embargo. Embargo means prevention of departure of the ships from the ports of a State. It was decreed for the most varied purposes: to confiscate the ships of the subjects of the opponent that may have been in one's ports, and also to prevent the spreading of information through ships leaving port (*arrêt de prince*), and again in order to enroll the crews of such ships, and finally, to compel such ships to perform service for the respective State (*ius angariae*).

But even outside the ports, and on the open seas, ships were stopped to be used in the service of the State. Selden¹ reports from the English practice regarding

Codicilli Edwardi III. Regis, in quibus iubetur naves universas X doliorem et quae excesserint in Mari Australi et Occidentali repertas sisti et armari, ut Regi inserviant—Sic usus est Edwardus Rex tertius, quemadmodum et alii reges Angliae.

(Decrees of King Edward III, in which it is ordered that all ships of ten tons burden and which have already made passage and been found in the southern and western seas may be stopped and armed in order to serve the king—such was the usage under King Edward III, and also of other English kings).

The learned English jurist availed himself of these instances from maritime practice in support of his theory of the *mare clausum*, but this theory met with no success.

Other writers sought to explain the practice of the seizure of ships for the service of a State on the basis of the Roman law. Such attempts were not of great scientific value; they were full of misconceptions of the principles of Roman law. But, as in all other

¹ John Selden, *Mare clausum*, II, c. 20.

things, upon accepting the principles of Roman law, it was not the purpose to grasp and interpret them in the only way in which they were expected to be grasped and interpreted, but, for the needs of the times, the foreign law had to be adapted to them. This process is similar to the one accepted in the doctrine of the *fideicommissum*.

In this instance it was also necessary to secure legal principles, on the basis of which it became possible to constrain a landed property for a certain family, a task Phil. Knipschild solved on the basis of the *fideicommissum quod familiae relinquitur* of the Roman law, but at the same time he had to modify the pure Roman law in order to make it serve for quite other circumstances than those for which it was intended. The views of Stypmannus,¹ Loccenius,² of Azuni,³ and also the commentary of Peckius with the *Commentarius ad commentarium* of Vinnius⁴ regarding maritime law have assumed importance in the doctrine anent the seizure of ships. The latter work is little more than a paraphrased explanation of the pertinent provisions of the *Codex*; but, nevertheless it has prepared the way for the acceptance of them in that theory.

The views of these writers may be summarized in the following manner:

1. The *angariae* of ships are the latter's use for the transportation of necessities of life, armies, articles of military armament, etc., in the service of a prince or of a free community for purposes of any kind of military expedition.

2. The right to make such requisitions, that is to say, the *ius angariae*, "est un droit régulier, dont jouissent les Puissances souveraines dans le cas de nécessité ou d'utilité publique".⁵ The idea that the seizure of the ships is a right of sovereignty, on the basis that in former times it was designated as a *regalia* is set forth especially in Loccenius:

Has angarias imponere possunt illi principes et respublicae, quae iura maiestatis habent. Inter regalia enim referuntur quoque navium praestationes, in c. un. *Quae sint regalia* (II *Feud.* 56). These restrictions can be imposed by those princes and republics that possess the rights of sovereignty. For among *regalia* are counted also forced services of ships.

3. The *ius angariae* may be exercised "dans le cas de nécessité ou d'utilité publique".⁵ Therefore, it is not a special principle coming within the rules of war. For the outfitting of expeditions of discovery and of conquest into the new world, ships may be seized, as well as for other purposes of transportation. "*Causa huius oneris est necessitas et utilitas publica in expeditione principali aut liberae reipublicae*" (the cause of this burden is the necessity and public utility in a capital expedition or the necessity of a free commonwealth); so says Loccenius, and in literal agreement with the *Codex Just.* he continues: "*Omnes enim in commune, si necessitas exegerit, convenit utilitatibus publicis oboedire*" (for it behooves all in common, if necessity demands it, to obey the public advantage). It is, therefore, not necessary that the State should be confronted by

¹ *De jure maritimo*, Pt. v, ch. 1, no. 23.

² *De jure maritimo*, Bk. 1, ch. 5.

³ *Droit maritime de l'Europe*, I, ch. III, sec. 7, p. 292.

⁴ Peckius, in *Tit. D. et C. ad rem nauticam pertinentes commentarius, cum annot.* Arn. Vinnii. Amst. 1668.

⁵ Azuni, in the work referred to before.

a situation such as meets the penal conception of necessity. It need only anticipate some benefit from the expedition in which the ships are to render service. Of course, this must always have been the case when ships were seized; for it certainly never happened that such ships, for the service of which the State had to make compensation, should ever have been seized without purpose and without some well-defined plan.

4. For the *ius angariae* can be exercised against any and all ships which for one reason or another are found within the jurisdiction of the State, no matter what may be the personal status and nationality of the owner. It operates alike against nationals and foreigners. Hence, the *ius angariae* is not a special principle pertaining to international law. Rather, it comes simply within the realm of the State law. All ships against which the prince or a sovereign community could exercise its physical power, were regarded as equally subject to its sovereignty. Stypmannus has endeavored to distinguish with regard to *angariae* of ships belonging to the subjects of the respective prince of a community and of those of nationals of foreign countries, and asks whether or not the latter may be seized, and his answer is affirmative: "*Fieri id posse, intrepide adfirmo et quotidiana confirmat praxis*" (that this may be done I strongly maintain and the daily practice confirms it also). Loccenius holds the same view, but reaches his conclusion by referring to D. 50, 4, 18, 22. But, as we have already seen, this assumption is false. The passage referred to does not in the slightest way refer to maritime law.

5. Finally, all writers express the opinion that foreigners at least shall receive compensation for services to which their ships are put. On the other hand, an obligation to return the equivalent, in case of the destruction or seizure of the ships by pirates or by an enemy State, has not been recognized. Azuni tries to distinguish between *angariae* arising by reason of war, and those effected for purposes of equipping an expedition into the new world, etc., and in the latter case he is in favor of payment of the equivalent for the loss of the ship, "*vu qu'il n'est pas raisonnable que quelqu'un souffre d'une expédition qui n'a d'autre objet que l'utilité d'un autre*".

6. Fraudulent acts in the exercise of the *ius angariae* were punished with the confiscation of the ship, even as had been done in case of the Roman law. Among such acts is classed, especially, the attempt to escape seizure and the unsatisfactory performance of the transportation service demanded. In the latter case, special penalties may be visited upon the captain or the owner of the ship.

SECTION 9.—PUBLIC TREATIES, ESPECIALLY OF PRUSSIA, FOR THE SUPPRESSION OF THE *IUS ANGARIAE*.

It is evident that such a right as this one must have been an extraordinarily heavy burden on private navigation. No ship could be certain but that some State, for some service of transportation might suddenly seize it. It was a right which implied on the seas an almost uninterrupted condition of feud. To the extent as this condition increased, the *ius angariae* became well-nigh unbearable. For this reason, since the close of the eighteenth century, we meet with an ever increasing number of treaties by which the ships of the subjects

of both contracting parties were relieved of the *ius angariae*.¹ As in many other directions, it is mainly the United States of America which sought to mark, in this respect, progress in international law; but Denmark, Russia, France and Prussia have concluded such treaties by which the contracting parties renounce the exercise of the *ius angariae* with regard to ships of the other party. But the most important maritime power, England, without whose cooperation maritime law could not be improved, failed to join in this movement.

Prussia has concluded two such treaties, one with the United States of North America and the other with Denmark.

In Article 16 of the treaty with the United States of September 10, 1785² it is stated:

Il a été convenu que les sujets ou citoyens de l'une des Parties contractantes, leurs vaisseaux ni effets ne pourront être assujettis à aucun embargo, ni retenus de la part de l'autre pour quelque expédition militaire, usage public ou particulier de qui que ce soit.

(It has been agreed that the subjects or the citizens of one of the contracting parties, their vessels or goods shall not be subject to any embargo, nor detained on the part of the other party for any military expedition, public or private use of whatsoever nature.)

This provision was meanwhile largely restricted through the treaty between Prussia and the United States of July 11, 1799,³ Article 16:

Si en tems de guerre ou dans les cas d'une pressante nécessité une des parties belligérantes se trouvoit obligée de mettre un embargo général dans tous ses ports ou dans certaines places déterminées, les bâtimens de l'autre partie seront soumis à cette mesure comme ceux des nations les plus favorisées, mais sans pouvoir réclamer en leur faveur les exemptions stipulés dans l'article XVI du traité précédent de 1785. Mais d'autre part, les propriétaires des vaisseaux qui auront été retenus, soit pour une entreprise militaire, soit pour tout autre usage, devront recevoir du gouvernement qui les aura employé, une indemnité convenable, tant pour le frêt, que pour la perte occasionnée par le retard. (Translation: If in time of war or in cases of urgent necessity, one of the belligerent parties should find itself forced to a general embargo within all its ports or within certain different places, the vessels of the other party shall be subject to this measure even as those of the most favored nations, but without the privilege of navigating in their favor of exemptions stipulated in Article XVI of the previous treaty of 1785. But, on the other hand, the owners of vessels which may have been detained either for a military enterprise or for any other use, must receive from the Government which may have used them a proper indemnification, both for freightage and for the loss occasioned by the detention.)

Finally, we should also consider Article 12 of the treaty of commerce and navigation of May 1, 1828:⁴

Article 13 and following up to and including Article 24 of the treaty concluded in Berlin in the year 1799 * * * are again put into force and they shall have the same value as if they formed a part of the present treaty * * * .

This means that the release of ships from the right of angary agreed upon in 1785 shall be maintained as it was intended to be regulated in the manner agreed upon in the treaty of 1799.

In the treaty between Prussia and Denmark of June 17, 1818, we read:⁵

Article 12: Not a one of these ships (that is to say the ships belonging to the subjects of one of the contracting powers) may be compelled to

¹ See the list of such treaties in Pöhl's, *Handelsrecht*, Vol. III, p. 1109, note.

² *M.R.* IV. p. 37.

³ *M.N.R.* IV. p. 531.

⁴ *Preuss. G.S.* 1829, p. 33.

⁵ *Preuss. G.S.* 1818, p. 189.

perform military service or be used for any sort of transportation, against the will of the owner.

This treaty was concluded for a period of thirty years and by treaty of July 6, 1846, it was renewed for another period of five years and after the expiration of this period, was to be continued, until one of the contracting parties should denounce it within a period of six months.¹ Neither of the two contracting parties availed itself, however, of this right. It was abrogated in 1864 by the outbreak of war between Prussia and Austria on the one hand and Denmark on the other, but by Article 2 of the Vienna treaty of peace of October 30, 1864, it went again into force. What is today the status of the validity of the two peace provisions referred to? Are they still in effect, and especially do they apply to the German Empire? Neither of the two treaties has been denounced.² Accordingly, they are still in force in so far as Prussian national law enters into our considerations. But, according to Article 4, 1, 14, of the imperial constitution, legislation with regard to these treaties comes within the competence of the empire and the latter, to be sure, has made use of its competence in the law anent military services of June 13, 1873 (secs. 23 and 24). Accordingly, principles of the Prussian national law, even in so far as they are based upon treaties, can no longer be regarded as valid. Releases from burdens imposed by the imperial law are valid only in so far as they are established by the empire itself. The two treaty provisions referred to can apply to the empire only if they are expressly or implicitly entered into Prussian treaties. An expressed transfer of the treaties on the part of the German Empire has not been effected; if a tacit transfer has taken place, this cannot be decided with absolute certainty.³ For since the formation of the German Empire no occasion for the practical application of the provisions, mainly dealing with war, and especially with the rules of maritime warfare, from which alone a decision might be had, has presented itself. As for the assumption of a tacit transfer of the treaties to the empire, we might base ourselves upon the analogy of the Paris maritime declaration to which, during the Franco-Prussian war of 1870-1871, the North German Confederation declared itself as bound.

SECTION 10.—THE *IUS ANGARIAE* IN THE MORE RECENT LITERATURE.

This movement in the international treaty practice⁴ could not be without influence upon the literature; and so, as early as the eighteenth century we already find writers who doubt the admissibility of the exercise of the *ius angariae*, or else deny that there is such a right, or at least desire to restrict it to a large extent.

Hugo Grotius has exercised the greatest influence upon these writers. These writers studied the works of Grotius, because they thought that in these works they would find the juridical basis for

¹ *Preuss. GS* 1846, p. 327.

² Even in the official collection (*Die Handelsverträge des deutschen Reiches*, edited by the Ministry of the Interior, Berlin 1906) both these treaties are referred to as still being in force (p. 162 ff., 1266 ff.).

³ With regard to the matter, see Niemeyer (*Prinzipien des Seekriegsrechts*, 1909), who refers to the "less considered Prussian (now German) - American treaties of June 12, 1799 and of May 1, 1823."

⁴ It is of particular importance that England should have had no part in this movement. We find no treaty in which this Power has renounced the exercise of the *ius angariae*. In those days, perhaps even more than to-day, England felt that she was the sole mistress and law-maker of the seas, and was opposed to restriction of her power by treaties.

the principles which passed as valid or at least as the correct right. In chapter 17 of the Third Book of his celebrated work: *De iure belli ac pacis libri tres*, he stated that seizure of neutral goods by a belligerent could be regarded as proper only if the latter could prove a "right of necessity."

In the passage referred to, he says:

Supervacuum, videri posset agere nos de his, qui extra bellum sunt positi, quando in his satis constet nullum esse ius bellicum. Sed quia occasione belli multa in eos, finitimos praesertim patrari solent praetexta necessitate, repetendum hic breviter quod diximus alibi, necessitatem ut ius aliquod det in rem alienam summam esse debere: requiri praeterea ut in ipso domino par necessitas non subsit: etiam ubi necessitate constat, non ultra sumendum, quam exigit: id est si custodia sufficiat, non sumendum usum, si usus, non sumendum abusus: si abusu sit opus, restituendum tamen pretium. (TRANSLATION: It may seem needless for us to treat of those that are not engaged in the War, when it is manifest that the right of war can not affect them; but because, upon occasion of war, many Things are done against them on Pretence of Necessity, it may be proper here, briefly to repeat what we have already mentioned before, that the Necessity must be really extream, to give any right to another's goods. That it is requisite, that the Proprietor be not himself in the like Necessity. When real Necessity urges us to take, we should then take no more than what it requires. That is, if the bare keeping of it be enough, we ought to leave the use of it to the Proprietor; and if the Use be necessary, we ought not to confuse it; and if we can not help confusing it, we ought to return the full value of it.)

The passage to which reference is made by the words *quod diximus alibi*, is L. II, Chp. 2. §§ 6-9 [book II, Chp. II, §§ VI, 1. 2. 3. 4.—VII, VIII, IX], in which the right of each individual to seize, when in dire necessity, the property of another, is derived from the law of nature.¹

¹ (The following is the translation of the passages referred to, and as indicated, taken from the English translation already referred to of Grotius, and here added for the sake of convenience, omitting, however, all footnotes.)

VI. 1. Let us now see whether Men may not have a Right to enjoy in common those Things that are already become the Properties of other Persons: which Question will at first seem strange, since the Establishment of Property seems to have extinguished all the Right that arose from the State of Community. But it is not so; for we are to consider the Intention of those who first introduced the Property of Goods. There is all the Reason in the World to suppose that they designed to deviate as little as possible from the Rules of natural Equity; and so it is with this Restriction, that the Right of Proprietors have been established: For if even written Laws ought to be thus explained, as far as possible; much more ought we to put that favourable Construction on Things introduced by Custom not written, and whose Extent therefore is not determined by the Signification of Terms.

2. From whence it follows, first, that in a Case of absolute Necessity, that antient Right of using Things, as if they still remained common, must revise, and be in full Force; For in all Laws of human Institution, and consequently, in that of Property too, such Cases seem to be excepted.

3. Hence, it is, that at Sea, when there is a Scarcity of Provisions, what each Man has reserved in store, ought to be produced for common Use. So in Cases of Fire, I may demolish my Neighbour's House, if I have no other Means of preserving my own; or if my Ship be entangled in the Cables of another Ship, or in the Nets of Fishermen, I may cut those Cables and Nets, if there is no other Way of being disengaged. All this is not introduced by the Civil Law; it only explains by such Regulations, the Maxims of natural Equity, and enforces them by its Authority.

4. Even amongst Divines it is a received Opinion that whoever shall take from another what is absolutely necessary for the Preservation of his own Life, is not from thence to be accounted guilty of Theft; That Sentiment is not founded on what some allege, that the Proprietor is obliged by the Rules of Charity to give of his Substance to those that want it; but on this, that the Property of Goods is supposed to have been established with this favourable Exception, that in such Cases one might enter again upon the Rights of the Primitive Community. For had those that made the first Division of common Goods been asked their Opinion in this matter, they would have answered the same as we now assert. *Necessity, says Seneca, the Father, that great Resource of human Frailty, breaks through the Ties of all Laws; that is, all human Laws, or Laws made after the Manner, and in the Spirit of human Laws. So Cicero, Cassius passed over into Syria, another's Province, if Men had regarded written Laws; but these suppressed, into a Province now his own by the Law of Nature. So Curtius says, that In a common Calamity, every Man looks to himself, and takes Care of his own Interests.*

VII. But here some Precautions are to be observed, that the Privileges of Necessity may not be too far extended. And first, that all other possible Means should be first used, by which such a Necessity may be avoided; either, for Instance, by applying to a Magistrate, to see how far he would relieve us, or by entreating the Owner to supply us with what we stand in Need of. *Plato did not permit one Man to draw out of another's Well, till he had digged so far in his own Ground that there was no longer any Hopes or Expectations of Water. And Solon required, that a Man should first dig to the Depth of forty Cubits: Where Plutarch adds, &c. He thought it convenient to assist Mens Necessities, but not to indulge their Sloth. And Xenophon, in his Answer to the Sinopenses, &c. Wherever we come, and have not the Freedom of a Market, whether in a Barbarian or a Grecian Country, we take what we have Occasion for, not out of Insolence but Necessity.*

VIII. But secondly, this is no Ways to be allowed, if the right Owner be pressed by the like Necessity; or all Things being equal, the Possessor has the Advantage. *He is no Fool, says Lactantius, who tho' it*

It is evident that Grotius, as he so frequently did in all his works, presented here the right of the future, and not the right of the present. Meanwhile, this is the first attempt to base this right on a deeper scientific ground, a right which it is intended shall apply to neutral property, and especially to neutral ships.

The view of Hugo Grotius has become basic for the law of nature. Vattel holds like views. He says:¹

* * * si une nation a un besoin pressant de vaisseaux, de chariot, de chevaux, ou de travail même des étrangers, elle peut s'en servir de gré ou de force, pourvu que les propriétaires ne soient pas dans le même nécessité qu'elle. Mais comme elle n'a pas plus de droit à ces choses que la nécessité ne lui en donne, elle doit payer l'usage qu'elle en fait, et elle a de quoi le payer. La pratique de l'Europe est conforme à cette maxime. On retient, dans un besoin, les vaisseaux étrangers qui se trouvent dans le port; mais on paie le service que l'on en tire. (* * * if a nation has a pressing want of the ships, wagons, horses, or even the personal labor of foreigners, she may make use of them, either by free consent or by force, provided that the proprietors be not under the same necessity. But, as she has no more right to these things than necessity gives her, she ought to pay for the use she makes of them, if she has the means of paying. The practice of Europe is conformable to this maxim. In cases of necessity, a nation sometimes presses foreign vessels which happens to be in her ports, but she pays a compensation for the services performed by them.

It is particularly interesting to note that both these writers know nothing, by name, of a *ius angariae*, although Vattel in the final sentence of the passage quoted plainly refers to it. They make no distinction in the treatment between neutral property on the seas and on land, and wish to subject all things to the same basic principles.

The literature of the 19th century, dealing with matters of international law, attempts, above all things, to conciliate the theory of the *ius angariae* with the views anent the natural law. If at all recognized, a *ius angariae* is recognized only in time of war. Apart from this, still another important change manifests itself; while the *ius angariae*, in former times, was to have been, according to its essence, an element in the State law, and in view of the fact that it was primarily established in order to explain the relation between a State and its subjects in regard to the prestations of the ships, the *ius angariae* is now being regarded more and more, as belonging more especially to international law, and it is sought by it to justify the authority of a belligerent to requisition neutral merchant vessels. Everywhere in the literature, there is an evident effort made to restrict the *ius angariae* with regard to the conditions under which it may be exercised.

Thus Sir Robert Phillimore² declares himself in favor of recognizing the *ius angariae* in war times only and to restrict it to cases of the most extreme necessity, without at the same time drawing any distinction between ships of the belligerent State and of neutrals. "But if the reason of the thing and the paramount principle of national

be for the Preservation of his own Life, will not rob the shipwrecked Wretch of his Plank, nor throw down the wounded from his Horse; because he thus abstains from doing an Injury which is a Sin, and to avoid this Sin is Wisdom. But what, said Cicero, if a wise Man be ready to perish with Hunger, must not he take away Victuals from another, tho' a perfectly useless and insignificant Fellow? No, by no Means; for the Preservation of Life is not more useful to us, than a Disposition of Mind which hinders us from consulting our own Convenience at the Expence of another. And we read in Curtius, he who will not part with his own, has still a better Cause than he that demands what is another's.

IX. Thirdly, When my Necessities shall compel me to take any Thing from another Person I certainly ought to make that Man Restitution as soon as I am able to do it. There are some tho' of a contrary Opinion, and argue thus, that whoever makes use of his own Right only, is not obliged to Restitution: Whereas the Truth of it is, this Right is not absolute, but limited to this, that Restitution shall be made when that Necessity's over. For it is sufficient that it go so far and not further, to maintain the Laws of natural Equity against the Rigour of the Rights of a Proprietor.

¹ *Droit des gens*, I. II, Chap. 9, § 121; see also § 119.

² *International Law*, 3d ed., II, p. 60.

independence be duly considered, it can only be excused, and perhaps scarcely then justified, by that clear and overwhelming necessity, which would compel an individual to seize his neighbour's horse or weapon to defend his own life." He recognizes, nevertheless, that the *ius angariae* is not without "the sanction of practice and usage."

Heffter¹ also states that it is admissible only as a measure in time of the most urgent necessity and only provided full compensation is made, that a belligerent party should seize neutral property, for instance, ships, and use it for his own purposes (*ius angariae*).

Rivier² admits that the idea of urgent necessity is quite generally applied in international law and he views the *ius angariae* as a measure which under the most unusual circumstances, that is to say, in the presence of a critical state, could be justified.

Westlake³ states with regard to the *ius angariae*: "It seems still to exist in case of real necessity, and its exercise would be certainly subject to the duty of compensation."

A number of other writers might be cited as holding exactly the same views.⁴ It will be seen that all these writers endeavor to execute the conditions of the exercise of the *ius angariae*. They believe that it is not enough that a *necessitas vel utilitas publicae* should exist. They demand a positive necessity of the State corresponding to that necessity which, by exception, disculpates an individual who has committed an act which is ordinarily subject to a penalty. The juridico-logical line of thought of these writers is, therefore, as follows: According to the general law of nations it is, on principle, forbidden that a State should use neutral ships for its own war purposes. Such use is permissible only in case the State is confronted by such an extreme necessity that it can save itself only by resorting to such an action. This situation would have to be, however, of such a nature that, *mutatis mutandis* it will admit of a departure from the principles of international law. Accordingly, the *ius angariae* is nothing but a special application of the doctrine of urgency, that is to say, of a right in case of necessity.

There are still other writers whose views are of such a radical nature that they will not even grant that in cases of the utmost necessity a State may use neutral ships for its own purposes. On the contrary; they believe that each exercise of the *ius angariae* is a violation of the neutrality of the State to which the ship belongs. This theory has been represented in Germany especially by von Bulmerincq,⁵ and abroad especially by Hautefeuille,⁶ and Kleen,⁷ and by still many others.⁸

On the other hand, many present-day writers such as von Bluntschli,⁹ Perels,¹⁰ von Martitz¹¹ and still others,¹² accept the *ius angariae*

¹ *Europäische Völkerrecht*, 8th ed., by Geffcken, p. 334.

² *Lehrbuch*, p. 425.

³ *International Law*, II, p. 118.

⁴ Flore-Antoine, *Nouveau droit international public*, sec. 1586; Woolsey, *Introduction*, 5th edition, sec. 118; Lawrence, *The Principles of International Law*, sec. 252; v. König, *Hdb. d. d. Konsularwesens*, p. 176, note.

⁵ In Holtzendorff's *Handbuch*, IV, sec. 33.

⁶ *Des droits et des devoirs des nations neutres en temps de guerre maritime*, 1868, Vol. III, p. 396 ff.

⁷ *Lois et Usages de la Neutralité*, II, p. 68 ff.

⁸ v. Neumann, *Grundriss*, 3, 1885, p. 141; Carnazza-Amari, *Droit International* II, p. 618 ff; Ullmann, *Völkerrecht*, p. 304, and even the *Institut de droit international*, *Annuaire*, XVII, p. 255 ff.

⁹ *Rechtsbuch*, sec. 795.

¹⁰ *Internationale öffentliche Seerecht*, 2, p. 221 f.

¹¹ *Völkerrecht in Hinneberg's Kultur der Gegenwart*, 1906, II, 8, p. 476.

¹² Despagnet, *Cours de droit intern. public*, 2nd edition, p. 530; Oppenheim, *International Law*, II, sec. 366; Geffcken in Holtzendorff's *Handbuch*, IV, p. 771.

as a positive right of a State toward neutral ships, and derived from international law.

REQUISITIONS OF NEUTRAL SHIPS IN ACCORDANCE WITH RECENT TREATIES AND RECENT PRACTICE.

SECTION 11.—GERMAN TREATIES AND GERMAN PRACTICE.

In view of such wide differences of opinion in the theory, it becomes the more necessary to examine international practice. In so far as literature considers the *ius angariae*, it contents itself with the statement that not a single case of the exercise of the *ius angariae* has been recorded during the last century. In view of the further fact that its abolition has been agreed upon in numerous treaties, it is inferred, it has become obsolete, and that its exercise would be in contradiction with the international law of the present day.

On the other hand, Perels¹ has called attention to the fact that there are treaties which have been concluded in the most recent times in which the existence of the *ius angariae* is either expressly or implicitly recognized. Moreover, practice is not the sole source of knowledge as concerns international law; from the treaties concluded by a State in relation to a definite legal matter, it may be ascertained how the State regards this matter on the basis of the principles of international law. Perels has established a list of the treaties which the German Empire has concluded with other States and which contain agreements with regard to the *ius angariae*.¹ This list may be regarded as complete, and to the present day there is no occasion to make any addition thereto.

I. Treaties referring to or dealing with the *ius angariae* have been mainly concluded by the German Empire with Central and South American States, as well as with Spain and Portugal and the Hawaiian Islands. The agreements reached in these treaties differ from each other in matters of detail. It should be noted that the expression "*ius angariae*," does not occur in international treaties; the expression is purely doctrinal. The treaties use the expression "*servir en guerre*" or refer to "*detention for the purpose of a military expedition or some other public use*," etc. The treaties concluded by the German Empire recognize almost without exception the fundamental right of the States to have recourse to such measures and are intent only upon providing certain guarantees for the exercise of this authority. If there could be any doubt as to this, it could at most be found only in the phraseology of Article 7 of the treaty of friendship, commerce and navigation with Colombia of July 23, 1892 (*RGBl.* 1894, p. 475). This article reads as follows:

* * * nor may their (that is to say, of the nationals of the contracting parties) ships, cargoes, goods and other articles be seized or detained extrajudiciously for military expeditions or for any other purposes whatever. In such case a measure has become unavoidable, a just indemnification shall be guaranteed to them, and in case such a measure is resorted to in peace times, the indemnification shall be previously agreed upon with the nationals.

This phraseology agrees with the conception of the *ius angariae* in the sense of a measure of necessity. In principle it is inadmissible

¹ Perels, *loc. cit.*, p. 222, note 3.

to use the ships of foreign nationals for one's own national purposes. But the contracting parties foresee the case of a public condition of necessity, and in advance they reach a special agreement to meet such a case.

But a similar conception does not appear in any other treaty concluded by the German Empire with regard to this matter. In all these treaties, no reference whatever is made to the "unavoidableness of such a measure" and only special agreements are reached with regard to the duty of making proper compensation. As an example; we will cite Article 2 of the treaty with Portugal of March 2, 1872, (*RGBl.* 1872, p. 256):

* * * sequestration of their possessions or seizure of their ships, cargoes, goods or effects for any public use whatever shall not take place without a previous guarantee of an indemnification on just and fair grounds agreed upon between the parties interested.

This conventional provision is undoubtedly explained on the basis that even foreign ships may, on principle, be used by a foreign State for service in the public interest, and that accordingly the State has a right to such prestations, both in peace and in war times. Between the two contracting Powers only the manner of the exercise of this right is definitely settled, that is to say, that in advance an indemnification must be guaranteed.

All other agreements of the German Empire with regard to this matter are controlled by the same principle. It is, furthermore, regarded as self-evident, that even foreign ships may not refuse to submit to such measures as are dictated by national necessity; only certain guarantees are agreed upon for the exercise of the right of the State to shipping prestations. According to the nature of these guarantees, these treaties may be divided into two main groups.

1. In Article 2 of the treaty of commerce and navigation of the German Empire with Portugal of March 2, 1872 (*RGBl.* 1872, p. 256), which has already been reproduced hereinbefore, and in Article 14 of the treaty with Mexico of December 5, 1882 (*RGBl.* 1883, p. 255), it is agreed that each of the contracting States may use for its own purposes ships belonging to the nationals of the other State, only provided that an adequate indemnification is previously furnished. In the treaty with Mexico we read:

* * * Their (that is to say, of the nationals of each of the contracting parties) ships, ships' crews, their goods, as well as any other of their possessions and valuable belongings may be seized or detained neither for a military expedition, nor for any other purposes of public service, of whatever nature, without a previous indemnification on a just and fair basis.

2. In the great majority of treaties concluded by the German Empire it is only agreed that before the use of the ships for national purposes, an indemnification shall be *agreed upon* or granted. Thus, in the treaty with Honduras of December 12, 1887 (*RGBl.* 1888, p. 267), we read:

ARTICLE 7. The ships, cargoes, goods and effects of the nationals of the one and of the other country may not be subjected, as between the contracting parties, to a procedure in seizure, nor be detained for purposes of any military expedition or of a public use, unless a fair compensation has been previously agreed upon by the parties themselves or by experts appointed by them to that end, such compensation to be, at all events, sufficient to cover all prejudices, losses, delays and damages which have been or which might be occasioned to them through the service, for which such ships, etc. have been used.

Literally and in agreement with this article, is Article 7 of the treaty of friendship, commerce and navigation, with Guatemala of September 20, 1887 (*RGBL.* 1888, p. 242), and Article 7 of the Consular Treaty and Treaty of Friendship, Commerce and Navigation, with Nicaragua of February 4, 1896 (*RGBL.* 1897, p. 175).

The nationals of the one and of the other country may, as between the contracting parties not be seized, nor may they be detained with their ships, ships' crews, cargoes, goods and effects for purposes of any military expeditions or for any public use whatever, unless a fair compensation has been previously agreed upon by the parties themselves or by experts appointed by them to that end, such compensation to be, at all events, sufficient to cover any prejudices, losses, delays and damages which may have been or might be occasioned to them through the service to which they were subjected.

Of a similar nature was the text of Article 6 of the treaty between the Zollverein and San Salvador of June 13, 1870, (*RGBL.* 1872, p. 381), but the compensation was to be determined in accordance with "local usage." The phraseology chosen for these treaties is inexact for the reason that it may give the impression as if the agreement applied only to such case when nationals of one of the contracting States are detained together with their ships, but not to that other case when the ships only are subject to compulsory service. At all events, the phraseology is intended to convey exactly the same meaning as that expressed in the treaty with Honduras referred to above. This is shown by the mere fact that in the treaty with Costa Rica it is stated: "the nationals can be subjected neither to seizure, etc. * * *" when in fact it is meant: things belonging to the nationals of both States can not be subjected to seizure. Therefore, an inexact reference is made to persons, when the reference is intended to apply to their property.

Difficulties of interpretation will also be met with in the treaty with the Dominican Republic of January 30, 1885 (*RGBL.* 1886, p. 8):

ARTICLE 8. Ships, cargoes, goods or effects belonging to Germans in the Dominican Republic or to Dominicans in Germany, may not be seized or detained for military expeditions or for other purposes of any nature whatever, unless a compensation to be agreed upon with those interested shall be allotted to them previously, and the amount of such compensation shall be sufficient to cover all damages, losses, delays or prejudices arising from such measure.

Even in this case it is agreed that before the seizure of the ships, only a compensation is to be agreed upon. It is not clear, however, to what persons this conventional provision refers. Are only ships referred to, such as belong to nationals of one of the two contracting Powers who have their domicile or who sojourn within the territory of the other party or does the force of the conventional provision extend to the ships owned by nationals of one of the contracting States? According to the phraseology it would seem that the provision applied to the former case; but it is quite certain that ships owned by a national or one of the contracting parties may not be, at all events be worse treated by the other party, if the owner does not reside within the territory of the other contractant. Since the ships of such subjects of one of the contracting parties who have their domicile within the territory of the other party are specially privileged, this should be even particularly so with regard to those ships whose owners live within the territory of their native State. In all probability this obscurity arises merely from a bad text, and

the meaning is the same as that expressed in the treaties we have so far referred to.

To this group of treaties belongs also Article 6 of the treaty of commerce and navigation with Spain of July 12, 1883 (*RGBl.* 1883, p. 311):

* * * their (that is to say, of the nationals of the high contracting parties) ships, cargoes, effects shall not be detained for any public use whatever without a previous agreement of a compensation established upon a just and fair basis by the parties interested.

This agreement appears to differ somewhat from those we have discussed heretofore, in view of the fact that it demands the guarantee, and not only the determination of the indemnification. But this is probably only apparent; for even of the other treaties it must be said that the "determination" of the indemnification entails forthwith the duty of the State to pay such indemnification.

A very special regulation is contained in the treaty with Colombia of July 23, 1892, Article 7 (*RGBl.* 1894, p. 475), which has already been reproduced hereinbefore. According to this article a compensation is to be granted for the seizure of ships for public purposes, but this compensation is to be agreed upon in advance only in peace times and not in war times.

Finally Article 2 of the treaty with Hawaii of March 25–September 19, 1879 (*RGBl.* 1880, p. 124) is somewhat strangely worded:

They (that is to say the nationals and citizens of each of the contracting parties) shall not be subjected to an embargo, nor shall they be detained together with their ships, ships' crews, cargoes, trade effects, to be used for any kind of military enterprise, or for any kind of public or private service, unless the Government or local authorities have come to an understanding with the persons interested with regard to the indemnification which is to be granted for such service, and as regards the compensation which may be fairly demanded for the damage (which is not of a purely chance nature) arising from the service voluntarily assumed by them. * * *

This article cannot be said to be a masterwork of juridical phraseology. According to this article it shall be proper to detain a foreign ship for private service, if in advance the Government or the local authority has come to an understanding with the persons interested as regards the indemnification. This would be an extraordinary extension of the authorities of the State with regard to foreign ships; and it may well be doubted if the contracting parties had this in mind, especially when we compare other treaties concluded with regard to this same legal matter. And what are we to understand by this: No ship may be detained and used for service (therefore of a compulsory nature) without there being an understanding with regard to the indemnification which may fairly be demanded for the damages arising from the service voluntarily assumed? This article should, of course, at the present time have no force whatever, in view of the fact that the Hawaiian Islands have become territory of the United States of North America, and hence, the laws and treaties of the Union must be applied to maritime law.

On the whole this may, therefore, be said with regard to the treaties of the German Empire: they recognize in a general way a right of the State to detain ships of foreign nationality and use them for public purposes, and with the sole exception of the treaty with Colombia, no difference is made with regard to the application of this measure in peace time or at such other times when one of the

contracting parties is waging war against a third state. Therefore, it is admissible in war times even with regard to neutral ships which are owned by nationals of the other party.

As regards the more minute circumstances under which this right may be exercised, we find but one reference and that in the treaty with Colombia which states: Here is demanded "unavoidableness" of such a measure. From the text of this treaty it cannot be definitely ascertained when such a case of "unavoidableness" exists. It must, therefore, be assumed that a sort of very special and critical necessity on the part of the State is required. In the other treaties no such determination has been defined. But from this we cannot infer that the State may arbitrarily seize foreign ships and use them for its purposes. Rather, it is to be said that in war time (and it is with this postulation that we are here dealing) the condition of the admissibility of such a measure is military necessity, that is to say the war necessity. As has already been stated before, this latter conception is in no way identical with or even analogous to the conception of necessity as we meet with in civil and penal law. Necessary for the war is everything that is required for the realization of the purpose of war, that is to say for the defeat of the enemy. It is quite possible that this was meant by the expression "unavoidableness" in the treaty with Colombia; it is, however, more probable that this expression was to have contained a climax. It is doubtful if a distinction can be drawn between unavoidable and not unavoidable measures dictated by military necessity.

As regards the matter of indemnification for the requisition of foreign ships for war service in the interest of the State three different regulations have been agreed upon in the various treaties: the indemnification is either to be paid in advance, or it shall merely be determined in advance, or it is merely agreed that an indemnification shall be paid (in the treaty with Colombia).

All conventional provisions to which we have referred seem not only applicable to the case when a Government requisitions neutral ships within its own territory, within its own ports, but also to the case when such act takes place within occupied enemy territory. A restriction to the former case is not expressly stated in any treaty and that it can not mentally be added is self-evident.

So far as the views of the German Empire are concerned with regard to international law, what is it that can be ascertained in reference to this subject from all these treaties? The only decisive deduction that can be reached, is this: it can certainly not be admitted that in virtue of the treaties German ships can be less favorably treated with regard to the other contracting States than they could be according to the accepted international law. Among the cocontractants of the German Empire we find a number of Central American Republics which, as a rule, are regarded as rather unsettled and unreliable. It is quite improbable that the German Empire should have, with regard to German ships, conceded to them greater rights than belong; according to the existing international law, to every sovereign State; for, in fact, the treaties would represent unilateral concessions on the part of the German Empire, in view of the fact that very rarely Dominican and Nicaraguan ships are found in German waters, while on the other hand, German ships frequently make port in Central American waters. It must, therefore, certainly

be admitted that by the treaties the ships enjoy greater privileges and are given a more favorable legal status, than they would have according to the view the German Government takes of the accepted international law.

The further consequence is that the international law as viewed by the German Government is, at all events, no better than the regulation agreed to in treaties which is most unfavorable to neutral navigation. According to this view which the German Empire takes of international law, the latter would, at all events, contain no more favorable principles than the following: in case of war necessity, neutral ships may be detained to be used for war purposes and indemnification must be paid for the service rendered; but payment of such indemnification is not to be made in advance, nor need it be previously determined (treaty with Co ombia).

II. It can not be determined from the treaties if international law is even more oppressive. We are, nevertheless, able to investigate the attitude of the German Government on the basis of a precedent on the occasion of which its conduct could not be adjusted according to the provisions of a treaty. We are referring to the Duclair incident which took place in the Franco-German war of 1870-71.

The authentic documents concerning the diplomatic negotiations anent this case have been made public.¹ And from these acts we may get important conclusions regarding the legal views, especially of the German, but also of the English Government. According to the report of the German commander, the facts of the case are as follows:²

A German military contingent had been ordered to occupy Rouen and to take position on both banks of the Seine. The military operations of the German contingent were, however, imperiled by the fact that French gunboats could steam up the Seine and direct their fire into the flanks of the Germans; in fact, according to the report of the German commander, it was even possible that, under the protection of the war ships, enemy troops could be landed in the rear of the German troops. In view of the fact that the presence of the French gunboats formed, for still other reasons, a constant danger, and it was not possible to hold them off by any other means, the German commander decided to close the channel of the Seine by sinking large ships in it. It is worthy of observation that the German commander did not regard this measure as an *ultima ratio* from special consideration for private or neutral property, but because "the great expense of attaining the end in this manner makes it appear desirable to attempt the blocking up in another and less costly manner." But, because any other measure was regarded as insufficient he proceeded with the requisition of the ships that were found near Duclair. The seizure of these ships was regarded by the German commander as ordinary requisition as may be seen from the fact that in his report he declares that he did not have the requisition made through the competent mayoralty: ". . . if a requisition had been for ships to the mayoralty here, probably all the ships, timely warned, would have gone to Havre." The captains received "an order" (evidently the customary receipt

¹ See, *Staatsarchiv* of Aegidi and Klauhold, vol. XXI, No. 4498-4509, evidently reprinted from the English Parliamentary Papers.

² *Ibid.*, No. 4502.

issued in the case of requisitions), in which, according to their own statement, the value of the ship was given.

The report of the commander shows that he considered his measure as sufficiently justified because it was made imperative through war necessity.

As to the views of the German Government regarding its duty to pay indemnification, these may be inferred from the conversation of Count Bismarck with Odo Russell. In the course of this conversation Bismarck stated that, according to the opinion of the juridical advisers of the German Government, the belligerent had an indisputable right, in case of self-defense, to seize neutral ships found within the waters of his opponent, and that the indemnification was to be paid by the conquered Power and not by the victor. Therefore, an obligation on the part of the German Government to make compensation for the thing used and destroyed was absolutely denied. Notwithstanding, the German Government declared its willingness to grant an indemnification. It will be thought quite evident that this courtesy of Bismarck had its source in his constant desire to prevent neutrals from becoming involved in the Franco-German war, and it must, therefore, be admitted that the German Government paid the indemnity for the sole reason that Bismarck endeavored, in so far as he could do so, to rid himself of all friction with other Powers and of all possibility of conflicts.

In his letter to the German Ambassador in London, January 25, 1871,¹ Bismarck does indeed appear to contradict his former attitude. In reference to the report of the German commander, he says: "the report shows that a pressing danger was at hand, and every other means of averting it was wanting, the case was, therefore, one of necessity, which, even in time of peace, may render the employment or destruction of foreign ships admissible, *under reservation of indemnification*." But the contradiction is probably only apparent, for at an earlier stage of the negotiations Bismarck had accepted a claim for compensation for the owners of the ships, but he had asserted that this claim should be paid by France. The affair was dealt with on the part of Germany entirely in analogy with cases of requisitions usually effected in warfare on land. This is made clear by the report of the German commander. However, as according to the view held by Germany with regard to compensation for requisitions that State is obligated within whose territory they are effected, the view of Prince Bismarck is to be interpreted as meaning that in the present case the respective English ship owners would have to address themselves to France. If such a case had arisen in peace time within German territory, the compensation would, accordingly, have had to be paid by Germany.

That this is meant, is not made very clear from the writing of Bismarck, for he refers to the *ius angariae* and in support thereof he quotes Phillimore, according to whose argument it would have been the duty of the German Government to make compensation. Reference to the *ius angariae* was made in all probability simply for the purpose of proving on still further grounds that the measure resorted to by the Germans was admissible in international law. Bismarck, however, did not intend to make the view of Phillimore his own.

¹ *Staatsarchiv*, as above, No. 4502.

It is still of further interest to inquire into the principles according to which the German Government found the amount of the indemnification. These principles may be found in the two letters of the English Minister of Foreign Affairs to the German Ambassador in London.¹ "According to these two letters the claims for compensation were divided into three groups: (1) Claims of the owners for the value of their ships and for losses sustained through their unavailability, (2) claims for the loss of the cargoes aboard the vessels, (3) claims of the ships' crews for losses of their effects and employment. Apart from these three groups of claims, compensation was asked for certain incidental expenses of the crews and of the British Government. For the ships, compensation for their market value plus an additional 25 per cent was paid. In the case of requisitions of necessaries of life effected by the Germans in France, the market price plus a similar additional per cent was generally paid in cash. But there is no reason whatever to admit that there is an international law principle by virtue of which the belligerent is obligated to make such additional payments. Such additions are generally to be regarded as fair, in virtue of the fact that those concerned will find it difficult to replace the requisitioned articles and because an indemnification calculated according to the prevailing market value does not, as a rule, suffice to compensate fully the party concerned for the requisitioned object.

In calculating the indemnification for the loss of freightage, the customary rate between 2s. and 6d. to 5s. per ton was accepted. Subsequently, however, the amount of 5s. was evidently adopted and from this were deducted the port dues and expenses of unloading which the ship owner would have had, so that finally the indemnification was calculated on the basis of 3s. 6d. per ton.

Claims of the sailors for loss of their employment were absolutely disallowed. On the other hand, compensation was allowed in lump sums for their belongings which they had lost, in so far as it could be ascertained that in their haste they were not able to save them all. Only in one case, full compensation for loss of belongings was allowed, because in this particular case the respective captain had not had sufficient time to bring his belongings into safety.

The principles in accordance with which the indemnification was established, were, therefore, as follows: not only the *damnum emergens*, but also the *lucrum cessans* (in the case of freightage) were indemnified. Furthermore, compensation was made not only for direct losses. The retroactive effect upon the wealth of the respective party was also taken into consideration; this is made evident by the fact that the additional per cent was added to the market value of the ships. It has not been asserted by either side that according to international law compensation must always be made in accordance with these principles. The English Government rather took ground by analogy with the case when a ship goes down or is lost as a result of a collision.

From the treatment of this case both on the part of the German and English Governments, conclusions may be established regarding their respective legal views upon this matter. We are discussing a case in which from purely war necessity neutral ships were requisi-

¹ *Staatsarchiv*, as above, No. 4505-4507.

tioned. This measure was especially defined by Germany on the ground that it was a case of self-defense. In view of the fact that the English Government was satisfied with this explanation and did not insist upon any kind of satisfaction, it must be admitted that the English Government was likewise of opinion that the case did not constitute a violation of international law, but that in virtue of the rules of war the German commander was authorized to resort to such an act. The documents in the case did not clearly show whether or not in the opinion of the English Government the German Government was obligated to make compensation. Germany, on the contrary, expressly denied that it had incurred such an obligation.

ADDITIONAL TO SECTION 11.—GERMAN LEGISLATION REGARDING THIS MATTER.

The German Imperial Law of June 13, 1873, dealing with war prestations refers its sections 23 and 24 to the requisition of ships. This law applies only to the imperial realm. As regards ships, the law does not decree an obligation to prestation on the part of communities or to contracting firms, but decrees a direct obligation on the part of the owners to leave their ships with the military administration. In this respect section 2 of the law applies also, that is to say, ships may be requisitioned only when to meet the existing need, no other recourse can be availed of, especially, through free purchase or payment in cash. If upon the demand of the competent authority the owner refuses to place his ship at the disposal of the military administration, then, in accordance with the general principles of administrative law, administrative execution takes place, that is to say, the military authority procures by force that which it is in need of.¹

The law distinguishes between two cases: (1) Whether the military administration merely needs the use of ships for war purposes; (2) whether the military authority intends to use the ships to block up ports and rivers. In the former case there is involved only a temporary use of the thing requisitioned, in the second case a complete appropriation of the thing is involved. In both cases the ship owners are entitled to a compensation, even in case they have not voluntarily submitted to the obligation.

In case the use of the ship alone is demanded, this compensation is granted on the basis of the principles established in Section 14 of the same law. In case a ship is involved which for the time being is not in use or otherwise is available, compensation is made only for the damages occasioned as a result of such use and for unusual depreciation. When other ships are requisitioned, compensation is also granted for the inability on the part of the owner to use them. Payment for such requisitions is made in accordance with the general principles applicable to requisitions. In case ships are requisitioned for use in blocking up rivers and ports, ownership thereof must be transferred to the military authority. In case the parties have not agreed in advance upon an indemnification for such seizure, the indemnification shall be established through experts and paid for

¹ The military authority does not, as a rule, act directly, but at its request, the competent local authority acts. For further details, see: *Kaiserliche Verordnung betreffend die Ausführung des Gesetzes vom 15 Juni 1873 über die Kriegseinstellungen vom 1. April 1871* (RGBl. p. 137) No. 12.

in cash from the most available means of the war treasury (sec. 23). According to the phraseology of the law it must be presumed that neutral ships may also be requisitioned by the military administration; for it is nowhere said that the obligation on the part of ship owners to surrender their ships applies solely to the nationals of Germany. On the contrary; for it is stated in section 1 of the law that with the day of mobilization the obligation of the *federal territory* to war prestations takes effect according to the law. This means that the legislator had not in mind an obligation which was personal, resting upon the nationals of the Empire, but an obligation directed to material things, to objects available within the territory of the realm. Hence, it must be assumed that, according to the law, the military administration has the right to requisition neutral ships to be used for war purposes. There is but one exception to this provided it is expressly stated in treaties that the ships of the nationals of certain States may not be requisitioned.

So far as juridical circumstances are concerned, and this in spite of the peculiar phraseology of the law, nothing but authority on the part of the military authorities is declared in the passages which have been quoted. It depends on the circumstances as to whether the use of the thing or the substance of the thing may be taken from the owner.

SECTION 12.—VIEWS OF OTHER POWERS.

1. With regard to *English Law*, in reference to the *ius angariae*, Halleck-Baker (*International Law*, 4th ed., vol. i, p. 520, note) says:

By the Civil Law a king is justified in pressing into his service or seizing ships of every description and of any nation, which may be found in his ports, for purposes of urgent necessity, but, nevertheless, a tacit condition of safe return is annexed to such seizure or pressing. By the ancient laws of England, the admiral might arrest any ship for the king's service, and after he or his lieutenant had made a return of the arrest in chancery, the owner of the ship could not plead against such return, because 'l'admiral et son lieutenant sont de record' (Black Book Admir. fol. 28-29 and 157-158, 15.R. II c. 3). Further it is evident, from the ancient writs and patents of England, that the Admiral, the wardens of the Cinque Ports¹ and others, were ordered to arrest and provide ships of war and other vessels, as well as to impress mariners and collect provisions and arms for the defence of Great Britain.

With regard to the last sentence of this quoted passage, it may be that the author had in mind the cases referred to by Selden (in his *Mare clausum* II. c. 20) in which orders were issued by the English kings to seize all ships encountered in certain regions of the high seas in order that they might be used by England for war purposes. But even today, the English would certainly not venture to resort to such proceedings; for it would presuppose a recognition of an unrestricted territorial mastery of England on the high seas; and in accordance with modern international law, the basic principle of the *mare liberum* generally holds. A ship on the high seas is only subject to the sovereignty of the State whose flag it flies,² and accordingly, it may not forthwith be used by any other State for use in the conduct of a war.

¹ As to this matter, see Pöhls, *Handelsrecht*, vol. III, p. 210, Note 75.

² An exception to this rule applies only to pirates who may be penalized by any State and whose flag is declared forfeited.

It must, however, be admitted nowadays that what Baker says with regard to the English Civil Law is also true in international law. It is, as we have seen, a view similar to the one which has been acknowledged by the German Empire. In his observation Baker only has in mind the case when neutral ships are requisitioned for transportation service. But we have found in its treatment of the Duclair incident, that the English Government does not regard as violation of international law the requisition of ships with the intent of destroying them in cases of urgent necessity, at least when compensation is made for such destruction. Another view of England operates in case English ships are requisitioned by foreign States, as can be seen in *The Queen's Regulations and Admiralty Instructions for the Government of Her Majesty's Naval Service* (1899) Art. 456:

In the case of any British merchant ship, whose nationality is unquestionable, being coerced into the conveyance of troops or into taking part in other hostile acts, the Senior Naval Officer, should there be no Diplomatic or Consular Authority on the spot, will remonstrate with the local authorities and take such other steps to assure the release or exemption as the case demand, and as may be in accordance with the Regulations.¹

By this, the belligerent is denied the right to seize a neutral ship for such services as would be connected with direct hostilities or represent an assistance contrary to neutrality. Even the seizure of English ships for the transportation of goods representing war contraband would lead to the interference of the ship's commander; for transportation of contraband is also frequently regarded by the English as participation in hostilities.² It does not appear quite clear but no doubt it must be denied that a requisition of ships for use to block up rivers or ports, as in the Duclair affair, would be regarded as inadmissible. For in such cases the ships are not compelled to take part in hostilities, and the owners will generally receive from the State full compensation for their ships. On the other hand, in requisitions for services of transportation for the belligerent, the ship owner may frequently, because of the prize law, be placed in a very precarious situation. When, for instance, the particular ship is seized by the opponent and declared good prize, or in other cases even sent to the bottom of the ocean, the belligerent might possibly refuse to compensate the neutral owner for the loss on the ground that the loss is absolutely casual, that such loss took place without guilt on his part, and also on the basis of the old *ius angariae*.³ As to whether this denial on the part of Great Britain is in harmony with the existing international law there is much doubt. It is certainly of the highest importance when the greatest maritime power expressed itself to that end; but it would still have to declare that on its part also it would not lay hold of neutral merchant ships for such purposes, and this it has hitherto failed to do. But it would be an untenable attitude, of course, if on her part, England should claim an unrestricted and complete power, and grant to other States only restricted rights.

¹ Quoted from Perels, *Intern. öffentl. Seerecht*, 2nd ed., p. 222, Note 2.

² Cf., for instance, Phillimore, *Commentaries* 2 III, p. 50: "Le droit d'angarie, is an act of the State by which foreign as well as private domestic vessels are seized upon and compelled to transport soldiers, ammunition, or other instruments of war, in other words to become parties against their will by carrying on direct hostilities against a Power with whom they are at peace."

³ Cf. above § 11, No 5.

Nevertheless, along the line disputed by England, a desirable progress of international law may be realized. But as yet, England stands alone in this respect.

II. *The United States of America* belong to those Powers which after the beginning of its existence as an independent political entity advocated with great zeal every possible freedom of neutral navigation from all burdens that a belligerent might impose upon it, and in many treaties it abolished the *ius angariae*, so that in those times it could be said that under no circumstances did it recognize a right of the belligerent to use neutral ships for the purposes of carrying on his war. Today the view of the United States in this regard has changed. What it regarded in former days as a universal rule, has now become an exception which is valid only in so far as it is expressly agreed upon. This can be seen from Article 6 of the codification of maritime law under the auspices of the Federal Government: The Laws and Usages on Sea. A Naval War Code prepared by Capt. Charles H. Stockton and prescribed for the use of the Navy by general order No. 551, Navy Department, Washington, June 27, 1900,¹ in which we read:

If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed upon in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon this matter.

Accordingly, requisitions of neutral merchant ships in the case of war necessity is unrestrictedly admissible. But "proper consideration" should be given to conventional agreements. That the parties concerned are entitled to compensation is expressly recognized. These provisions of the North American law correspond, therefore, in general to that which has been agreed upon in the more recent treaties concluded by the German Empire.

In treaties concluded in recent times by the United States, and in so far as they deal with this matter, the same legal view is expressed. For instance, Article 8 of the Treaty of the United States of America with Salvador of December 6, 1870 (*MNRG.* 2, I, p. 81) states:

The citizens of neither of the contracting parties shall be liable to any embargo, nor be detained with their vessels, cargoes, merchandise, or effects, for any military purpose whatever, without allowing to those interested an equitable and sufficient indemnification.

In this case, therefore, it is neither required that the indemnification should have been agreed upon in advance, nor that it should be paid in advance. Broader in this respect is Article 2 of the treaty of the United States of America with Peru of September 6, 1870, (*MNRG.* 2, I, p. 98):

* * * Nor shall they (they citizens of either country) be liable to any embargo, or be detained with their vessels, cargoes, merchandise, goods, or effects, without being allowed therefore a full and sufficient indemnification, which shall in all cases be agreed upon and paid in advance.

III. In former times France concluded certain treaties which were intended to abolish completely, between the contracting parties, the

¹ The N. W. C. has, moreover, by a general order of the Navy Department of February 4, 1904 been rescinded. Its main object had been to draw the attention of the States to the need of such a codification and to set forth the views of the North American Government with regard to the matter (Niemeyer's *Zeitschrift für internationales Privat-und öffentliches Recht*, vol. XVI, 1906, p. 117). It is reprinted in Niemeyer's *Zeitschrift*, vol. XI, 1902, p. 398 ff.

ius angariae in any form whatever, as for instance with Russia on December 31, 1786 (Article 24; M. R. 2, IV, p. 209).¹

In another case, on the other hand, French practice took another viewpoint. For it seems that the transportation of French troops to Egypt in connection with Napoleon's expedition of 1798 was not effected by means of French ships, and that for this purpose a number of neutral ships stationed in French Mediterranean ports were seized.²

In more recent times France by treaties which she concluded, has adopted views similar to those of the German Empire and the United States. In Article 6 of the treaty with Spain of February 6, 1882 (*MNRG.* 2, IX, p. 139) we read:

Les ressortissants des deux Parties contractantes ne pourront être assujettis respectivement à aucune saisie, ni être retenus avec leurs navires, équipages, voitures et effets de commerce, quels qu'ils soient, pour aucune expédition militaire, ni pour aucun service public, sans qu'il soit accordé aux intéressés une indemnité préalable-ment convenue. Ils seront néanmoins soumis aux réquisitions pour transports (bag-gages); mais dans ce cas, ils auront droit à la rémunération officiellement établie par l'autorité compétente dans chaque département ou localité pour les nationaux. (Translation:) The nationals of the two contracting parties may not be reciprocally subjected to any seizure, not be detained with their vessels, crews, carriages and com-mercial effects of whatever nature, for any military expedition or for any public service, unless an indemnification agreed upon in advance has been allowed the parties interested. They shall, nevertheless, be subjected to requisitions for trans-portations (baggage); but in such case they shall be entitled to a remuneration offi-cially determined by the competent authority in each department or locality, for the nationals.

Here a distinction is made. To requisitions of transportation of baggage the nationals of both parties shall be subject even as the nationals themselves and even as the latter, they shall be entitled to indemnification. On the other hand, and in case of other requi-sitions for purposes of a military expedition, the indemnification shall in advance be agreed upon between the parties concerned.

Payment of indemnifications that shall have likewise been agreed upon in advance between the parties, is required by the textually identic Article 8 of the treaty with Domingo of September 9, 1882 (*MNRG.* 2, XV, p. 826) and of Article 8 of the treaty with Mexico of November 27, 1886 (*MNGR.* 2, XV, p. 842):

Les navires, cargaisons, marchandises ou effets appartenant à des citoyens de l'un de l'autre Etat ne pourront être respectivement soumis à aucun embargo, ni retenus pour une expédition militaire quelconque, ni pour quelque usage public que ce soit sans une indemnité préalablement débattue par les parties intéressées, fixée et acquit-tée, suffisante pour compenser les pertes, dommages et retards qui seraient la consé-quence du service auquel ils auraient été astreints. (Translation:) The vessels, car-goes, merchandise or effects belonging to the citizens of the one or of the other State may not reciprocally be subjected to any embargo, nor detained for any military expedition whatsoever, nor for any public use whatsoever, without an indemnifica-tion discussed, fixed and acquitted in advance by the parties interested, sufficient to compensate the losses, damages and delays that might result from the service to which they might have been constrained.

IV. Italy has also concluded a number of treaties anent this subject and followed different systems:

¹ Pöhlis (*Handelsrecht*, III, p. 1169) cites a treaty with Holland of December 21, 1739 (Article 13) and Carnazza-Amari (*Droit international*. II, p. 618) cites as the oldest of its kind such a treaty with Denmark of the year 1645.

² In regard to this matter, see a letter from the Swedish Chancellor to the Prussian Minister, November, 1800 (*M.R.* 2, VII, p. 163): " * * * parceque des navires marchands avoient été forcés de transporter des troupes françaises pour la surprendre * * * "

Only the duty of the State to make compensation is stipulated in Article 12 in the treaty with Mexico of December 14, 1870 (*MNRG.* 2, I, p. 428):

Al. II: Similmente non potranno essere occupati o detenuti i loro bastimenti, equipaggi e mercanzie, od altre proprietà ed effetti, per qualunque spedizione militare, ne per il servizio dello Stato od altro uso di servizio pubblico qualsiasi, senza una corrispondente indennità. (Translation: Sub-paragraph II: In like manner, their vessels, crews, and merchandise, and any other property and effects may not be seized or detained for any military expedition whatever, nor for the service of the State or any other use whatever of public service, without an adequate indemnification.)

In the treaties with Guatemala and Honduras of December 31, 1868, Article 4 (*MNRG.* 2, IV, p. 236 and 243), identic in text, it is agreed that the indemnification shall be determined in advance:

I cittadini di ambo le Parti contraenti non potranno essere sottomessi rispettivamente a nessun sequestro embargo, nè essere trattenuti coi loro bastimenti, equipaggi, mercanzie o oggetti commerciali per qualunque spedizione militare nè per ragione di Stato nè per uso pubblico di veruna sorte, senza che sia loro accordata un' indennità previamente convenuta. (Translation: The citizens of the two contracting parties may not be reciprocally subjected to any sequestration or embargo, nor be detained along with their vessels, crews, merchandise or commercial effects for any military expedition whatever, nor for any reason of State, nor for any public use of any sort, unless an indemnification agreed upon in advance shall have been granted them.)

Article 7 of the treaty with Columbia of October 27, 1892 (*MNRG.* 2, XXII, p. 310) agrees substantially with Article 7 of the treaty between the German Empire and Colombia of July 23, 1892, and quoted above.

Finally, Italy has concluded the only two treaties of recent times by which complete freedom of the ships from any seizure by the State has been agreed upon; in the first place, Article 4 of the treaty with Domingo of October 18, 1886 (*MNRG.* 2, XXVIII, p. 665:

Le navi, i carichi, le merci e gli effetti appartenenti ai cittadini delle due Parti contraenti non potranno sottoporsi rispettivamente a niuno embargo nè essere trattenuti per una spedizione militare qualsiasi ne per servizio pubblico di veruna sorte. (Translation: The vessels, the cargoes, the merchandise and the effects belonging to the citizens of the two contracting parties may not reciprocally be subjected to any embargo, nor detained for any military expedition whatever, nor for any public service of any sort.)

and Article 5 of the treaty with Nicaragua of June 25, 1906 (*MNRG.* 2, XXXV, p. 270):

I cittadini di ambe le Parti contraenti non potranno essere sottomessi rispettivamente a sequestri od embargos, per ragioni di Stato, nè per spedizioni militari nè per causa di uso pubblico di veruna sorte; nè potranno essere trattenuti coi loro bastimenti, equipaggi, mercanzie od oggetti commerciali per eguali motivi. (Translation: The citizens of the two contracting parties may not reciprocally be subjected to sequestrations or embargoes for reasons of State, nor for military expeditions, nor for purposes of public use of any sort whatever; they may not be detained along with their vessels, crews, merchandise or commercial effects for like reasons.)

V. The juridical view of the three last-named States with respect to requisition of neutral ships cannot be ascertained on the basis of the treaties concluded by them in the same manner as in the case of the German Empire. It seems absolutely improbable that they intended to grant a less favorable status to neutral ships than enjoyed by the latter in accordance with the international law uni-

versally accepted by the States. Therefore, international law as accepted by the States will not grant a more privileged status to such neutral vessels than they would enjoy according to the conventional agreement least favorable for them. The view of France and Italy ascertained in this manner is, however, the same as that established in the treaties concluded by the German Empire.

SECTION 13.—THE PRESENT INTERNATIONAL LAW.

In summarizing what we have so far considered, we come to the following conclusion with regard to the accepted international law:

The rules of war recognize the right of the belligerent, in case of war necessity, to use as well neutral merchant ships for his war purposes.

For such use the owners must, however, be indemnified, and in case the requisition of neutral ships takes place within the territory of the belligerent himself, the indemnification must at least be determined in accordance with those same principles as would be applied in the case of requisition of ships belonging to the subjects of the belligerent. If the requisition takes place within the occupied enemy territory, it cannot be ascertained offhand that the belligerent who effects such requisition, is, according to the universally accepted international law, obligated to make compensation. For when international law is developed on the basis of those rules regarded by the States as binding in their mutual relations, then a principle controverted on the part of at least a very important Power, cannot be recognized as part of universal international law. In view of the fact that in the matter of the Duclair incident the German Government most emphatically declared that it did not hold itself obligated to indemnify the English ship owners, but that, on the contrary, this obligation fell upon France, it can, therefore, not be ascertained that there exists a claim for indemnification against the belligerent. Uncertainty with regard to this matter can only be found to exist in the present international law. In case requisitions of ships are effected in connection with military operations of warfare on land, the belligerent will feel inclined to rest them on the principles governing requisitions in warfare on land, that is to say, in case he cannot or will not immediately pay for such requisitions in cash, he will leave open the question of compensation, and thereby leave the respective ship owners in the same situation as that of the owners of receipts for supplies that they have furnished, or in the same situation as the owners of objects enumerated in Article 53, II, of the rules of war on land, provided the treaty of peace does not contain provisions with regard to indemnities, and provided the State within whose territory the requisitions were effected does not consider itself obligated, as France did in 1871, to grant full compensation.

Of course, a belligerent State which cares to avoid coming in conflict with neutrals, will consent to make compensation. It may even be said that there is a tendency in international law to recognize such a duty to indemnification. As we have already seen, in all treaties dealing with this matter, it is agreed that the State which uses neutrals for service in the public interest, shall fully compensate

them; in most cases it is even agreed that such an indemnification shall be determined in advance between the parties or even paid in advance. Furthermore, one may plead the analogy of Article 19 of the Convention anent the rights and duties of neutral Powers to persons in case of war on land which establishes the duty on the part of the belligerent to make compensation for requisition of neutral railway material. For it is a fact that neutral ships in the ports of the belligerent are in a position similar to that of neutral railway material within the territory of the belligerent. Such ships have, more or less, through chance and only temporarily, come under the actual power of the belligerent, and important reasons of fairness demand that they be better treated and better safeguarded than the property of such neutrals which through their continued sojourn within the territory of the belligerent State is internally bound up with its national economy, and which through the taxes paid on such property contributes to strengthen its auxiliary sources.

It cannot, however, be proved that this tendency which has manifested itself in international law has already been realized and become accepted law. In this matter, it is not the jurist but the practice of war and the evolution of war in political treaties which say the last word. A further advance in the present juridical situation might be attained in still another manner, and to this end the most important maritime power, England, has expressed its readiness. This progress would be attained along the line incorporated in England in the provision of the Queen's Regulations, Article 456, which we have already discussed. It is indeed very dubious that the State from war necessity, should be entitled to use neutral ships for acts which because of the peculiar conditions of the rules of maritime warfare, might prove dangerous to such ships. While no one would assert that a belligerent may without further ceremony confiscate neutral railway material, serviceable for the transportation of the troops of the opponent, yet a ship carrying enemy troops is forfeited according to the prize law. This seems especially unfair when the ship has been compelled to such service by the other belligerent. Therefore, we find it stated here and there in the literature upon the matter that the prize law should cease to operate in such a case¹ and the belligerent return the ship to its owner. There are no protestations to that effect in recent times, and the theory can, therefore, hardly be expected to develop into a certain, indisputable result.

When, for instance, in the London Maritime Declaration of 1909, it is declared:

ARTICLE 46. Un navire neutre est confisqué et d'une manière générale passible du traitement qu'il subirait s'il était un navire de commerce ennemi * * *.

4° Lorsqu'il est actuellement et exclusivement affecté, soit au transport de troupes ennemies, soit à la transmission de nouvelles dans l'intérêt de l'ennemi; (Translation: Article 46. A neutral vessel is confiscated and in a general way subject to such treatment as it would meet with if it were an enemy merchant ship * * *).

When it is actually and exclusively used either for the transportation of enemy troops or for the transmission of information in the interest of the enemy);

it would have to be admitted that it makes no difference whether the ship voluntarily or compulsorily renders the State services, for it is only asked that the ship does, in fact, render that kind of serv-

¹ See Hübner, *De la saisie des bâtiments neutres*, P. I, B. I, ch. VII, sec. 2, p. 107.

ices. This conclusion becomes again of an uncertain nature when we consider the last paragraph of Article 46:

Dans les cas visés par le présent article, les marchandises appartenant aux propriétaires du navire sont également sujettes à la confiscation. (Translation: In the cases had in view in the present Article, the merchandise belonging to the proprietors of the vessel is also subject to confiscation.)

The confiscation of the goods is certainly intended as a penalty for the ship owner because of the unneutral support of the other belligerent. Are we to infer therefrom that this penalty shall also be inflicted upon a person whose ship has been forced by the other State to perform such services? Juridical feeling and fairness seem to be against such an assumption. On the other hand, it must, however, be borne in mind that in war time, of course, it is exceedingly difficult to establish that a ship has actually been used through force on the part of the opposing State. Furthermore, in case exemption of such neutral ships from the prize law is recognized, it might readily occur to a State to requisition neutral ships and not ships of his subjects for its military operations. Neutral ships would run no risks and ships of the subjects of the State might quietly bide under the protection of the home waters.

Thus, we would be likely to conclude that the question as to the prize law with regard to neutral merchant ships forced to service by the opposing State, has not yet been fully cleared up. Probably, however, the stricter view would prevail in practice and the capturing State would refer the interested neutrals to the opposing State in the matter of an indemnification. We shall not deny that the position of the neutral ship owner is most precarious and unpleasant, but the reason therefor is to be found in the entire system of the rules of maritime warfare which in so many cases recognizes the possibility of confiscation of private ships which is determined by reasons of expediency and politics and not by mere fairness, and in which the rights of private individuals are given less consideration than they receive in the rules of warfare on land.

SECTION 14.—JURIDICAL CONSTRUCTION.

How are we to construe, on a juridical basis, the right of a belligerent to requisition neutral ships? In the literature upon this matter we meet with the widest differences in opinion. Almost every publicist has his own personal and special view with regard to the matter.

The old doctrine of the *ius angariae* was at the same time a juridical construction. But it not only attempted to explain the right of a belligerent to requisition neutral ships but also the right to requisition the ships of his own subjects, both in case such requisitions were made in the ports of the belligerent and on the high seas. To justify the admissibility of such measures reference was had, as has been shown, to Roman law, and also to the thought that the right to resort to such measures was a royal privilege, that is to say a right inherent in sovereign authority as such against private individuals. In the most recent times this theory has been given up; it is no longer defended, and justly so. It has been recognized that a State seizure of the property of its own nationals is to be

explained on the basis of reasons very different from the seizure of neutral property. The former is an affair which pertains entirely to internal law and can be settled only on the basis of this law. It is the business of the national law to say how this regulation shall be applied in individual cases. It can not be explained for all States on the same principles. Nor is this theory useful in international law; for if this theory was introduced into international law it could but declare that a right to requisition foreign ships belongs only to sovereign Powers, that is to say, to the States, but it could not declare what tenor and what scope this right obtains. If it is sought to explain this through the Roman Law, it must be stated that this Roman Law did not deal with the matter of requisitioning foreign ships. That part of the Roman Law which has been regarded as a criterion for this question, relates to entirely different matters. But above all it would be impossible to find in Roman Law any authoritative legal rule for the States in their mutual relations.

The doctrine of the natural law, especially that of Hugo Grotius and Vattel, concerned itself but little with our subject. It merely stated the principle that in case of a real and complete necessity, every man had a right to the property of another man. From this it drew the conclusion that requisitions of any kind whatever are admissible in only such cases of necessity, and that they are inadmissible when the owner is confronted by a like necessity. To reach this conclusion, Grotius had in mind the well-known fiction of an anterior political society and argued as follows: Private ownership seems to give sole and exclusive mastery over a thing. But in cases of extremest necessity the old right again revives, the right to use the thing as if it were still held in common ownership.¹

Nor can this construction suffice to explain the rights of a belligerent with regard to neutral ships, for if carried to its last analysis, it would lead to the result that in cases of "extremest necessity," even individual soldiers would be entitled to the right to seize neutral ships. This, however, is certainly not correct. Any requisitions of neutral ships require an act of the State, that is to say, an act issued by an organ of the State authorized thereto. When no such act exists, seizure of a neutral ship would present a trespass which can not be justified and might make the State responsible on the basis of international law.

There is a close connection between the theory of a right in case of necessity, which we have just denied, and the "theory of urgency".² The latter does not in fact recognize "a right in case of necessity," but means that in international law it is possible to plead urgency as a cause for excuse. There would be urgency in case there were concurrency between the exercise of the right of self-preservation of a State and the obligation of the latter to respect the right of another State. In such cases the right of self-preservation has precedence. It is intended to expound the right of angary from the

¹ Hugo Grotius, *De iure belli et pacis*, L. II, cap. 2, secs. 6-9.

² This theory is represented especially by Rivier, *Lehrbuch* 2, 1899, p. 425 and 187; v. Liszt can really not be regarded as an advocate of this theory. For he says (*Völkerrecht*. 1911, sec. 42 I.) " * * * when the object of the war demands it, neutral ships * * * may be used for the conduct of the war"; accordingly, he regards military necessity as the criterion. When in sec. 42, II, 4 he states: "the exercise of the right of angary is only admissible as a measure of urgency" this does not, according to the text, evidently apply to ships, but to requisitions of neutral railway material in accordance with Article 19 of the Convention dealing with the rights and duties of neutral powers and persons in case of warfare on land.

same point of view. This attitude must, in the first place, be controverted because the idea of urgency presupposes that the act of urgency should be in itself forbidden. We have seen, however, that there is no principle of international law which forbids the seizure of neutral merchant ships for war purposes. Moreover, such seizure is possible not only when the existence of the State is at stake, but even in cases of ordinary military necessity. If any other deduction is made, then we come to impossible consequences. For otherwise, a State would have to yield a military advantage secured in the course of the war which it can maintain only by requisitioning neutral property, in case by so doing, it does not exactly stake its self-preservation, but if even for other reasons it would be of great interest to it to maintain that situation.

Rather, the correct construction might be as follows: During their presence within the territory of another State, foreign ships are subject to the latter's authority, and, in consequence, subject to all measures it may deem necessary in virtue of unusual circumstances. Accordingly, neutral ships stationed within the territory of the belligerent, may also be subject to such other measures as may, in virtue, of the war, be of a neutral order, therefore, subject both to requisition for services and to requisition for other uses, such as might lead to the destruction of the ship. Decisive in this matter are the rules of the national law operating on the basis of military necessity.

In view of the fact that the enemy sovereignty is suspended by the military occupation of enemy territory and is replaced by that of the belligerent, therefore, even neutral ships found within such territory are subject to his authority and hence, to his seizure. To what extent they may be seized, military necessity must again in this respect prove the criterion even as in the case of requisitions made within enemy country.

PART III.

SECTION 15.—REQUISITIONS OF NEUTRAL PROPERTY ON THE HIGH SEAS.

Up to the present we have considered the legal status of such neutral ships as are within the sovereignty of the belligerent, that is to say especially within his ports, his territorial waters or in the waters of the enemy State. That this is the sole aim of Conventional agreements is shown by the fact that in these agreements the word "to detain" (*detain, retenir, trattenere*) is always used. This expression can have a real meaning only if we admit that the ships are already within the sphere of the power of the State, and especially within its ports. Nowhere in these treaties can a regulation be found regarding requisition and seizure of neutral ships and property on the high seas.

But the principles of the *ius angariae* were especially intended for such cases. In the ancient practice of maritime warfare it happened that the States sent forth their ships on the high seas to seize all vessels they encountered, even neutral vessels, in order that they might be equipped for warfare and used for that purpose. It was against this practice that the treaties dealing with the abolition of the *ius angariae* were directed.

During the past century, measures of this sort have been resorted to by no belligerent. It may, therefore, be asked whether this old right may be regarded as still existing, or whether its non-exercise on the part of the maritime Powers during the last century may be regarded as a tacit abolition of it. Even as in all other respects, when we have not a clearly defined international practice, we meet in the literature with differences of opinion.¹ But it might be asserted that the prevailing judgment is to the effect that no belligerent may proceed in such an unrestrained manner, but so far as the *ius angariae* is concerned, it is restricted to those neutral ships which are found in his ports or in his territorial waters.²

Such a procedure could in fact only be justified if we were to admit that the belligerent may exercise a political authority over the open sea. It is, however, correct to say that the open sea, at the outbreak of a war belongs to the zone of war operations; but this only means that the belligerent States are permitted to engage in hostilities on the open sea; but on the open seas there is no "autorité militaire" as there is within occupied enemy country in case of war on land. Neutral shipping need in no way submit to any directions on the part of the belligerent. It is true that international law recognizes cases in which the belligerent may exercise sovereign rights against neutral ships, namely, in case of breach of blockade, or of the transportation of contraband, of unneutral aid, etc.; but in all these cases the interference of the belligerent bears only the mark of a measure of precaution or of a penalty for direct or indirect participation of neutral ships in the hostilities. A legal principle according to which neutral ships might also be subject to requisitions on the part of a belligerent would be outside the system of the rules of maritime warfare as they exist with regard to neutrals. Such a principle would, therefore, have to have its basis in practice, if it were to be regarded as accepted international law. But inasmuch as practice has not evolved any definite principles, the general principle of the freedom of navigation should in this case also apply. And thus we are brought to the conclusion that requisitions of neutral ships on the open seas are not admissible in accordance with the present-day ideas. Nowadays, neutrals would not expect such an extension of the claims of the belligerent.

It may, however, be asked if in cases of pressing necessity a departure from this rule is admissible, or are requisitions admissible in such cases? This question has been answered by many authors in the affirmative.³ But even in this case it behooves us to be cautious. Requisitions of neutral property on the high seas might easily enable a warship to continue hostilities longer than it would be possible were it solely dependent upon the supplies which it carries. It might perhaps be more correct to admit that such requisitions are absolutely forbidden. If we admit,⁴ that the idea of urgency is generally applicable in international law, but if we admit that which is perhaps even more correct, that the principle: "War reason has precedence over war urgency," is more to the point in

¹ For the existence of such a right, see Oppenheim, *International Law*, II, sec. 365.

² See, Hall, *International Law*, 5th ed., p. 654 f.; Perels, *Internat. öffentl. Seerecht*, p. 221; Halleck-Baker, *International Law*, 4th ed., I, p. 520; v. Martitz, *Völkerrecht*, p. 476.

³ Oppenheim, *International Law*, II, sec. 365.

⁴ v. Liszt, *Völkerrecht*, sec. 24, III; Rivier, *Lehrbuch* 2, sec. 21, II, p. 184.

the rules of warfare, there is reason to believe that on this basis a satisfactory result might be reached for all cases.

PART IV.

SECTION 16.—RESULT OF THE PRESENT STUDY AND POSSIBILITIES OF DEVELOPMENT IN INTERNATIONAL LAW.

As a result of this study we have seen that the existence of a general principle of international law cannot be proven according to which neutral property within the territory of one of the belligerents enjoys a privileged status as compared with the property of the nationals of the belligerent parties, in so far as requisitions are concerned. Rather, the belligerent is entitled to subject it to those same measures which he decrees against the inlanders, that is to say, within occupied enemy country against the nationals of the State against which war is being waged. On the other hand, it must be maintained that the belligerent may not treat the property of neutral nationals less favorably than that of the inlanders, that is to say, of the nationals of the enemy State. He may subject it only to the same conditions of requisition as that of the latter, and he must grant equal rights for claims of damages to the respective neutral owners. In those cases, in which he does not grant a right of compensation to the inlanders, that is to say, to the nationals of the enemy State, nationals of neutral States may not, because they are foreigners, claim an extraordinary right to compensation. These principles are applicable to all objects found under the authority of the belligerent, and, therefore, within his national territory or within the occupied enemy territory. It matters not whether the respective neutrals have or have not their permanent domicile or a permanent commercial establishment, etc. within such territories. Nor does it make any difference in what manner such neutral property has come within the territory of the belligerent parties, whether by destination it is to remain there permanently or whether it got there only in transit. All those found within the territory of the belligerent parties are subject to their seizure under equal conditions and procedures. Since in case of the requisition of neutral private property the belligerent makes use only of the sovereignty belonging to him within his own and within the occupied enemy territory, it is necessary to establish for the requisition of neutral property a special *ius angariae* to be availed of by the belligerent in case of necessity. It suffices to say that in the exercise of his territorial sovereignty the belligerent is not prevented by international law from requisitioning neutral property under the same rules as that of the nationals of the enemy State in occupied enemy territory.

Neutral railway material alone is subject to special treatment. The Hague Conference has declared that it may be requisitioned only in cases of imperative necessity, and that the belligerent who has effected such requisitions is obligated to grant an indemnification no matter where the requisition took place.

Moreover, there exists in international law a tendency which has found expression in the treaties of commerce, friendship and navigation, to accord better treatment to ships, cargoes, goods and effects belonging to the nationals of neutral States that come in the power

of a belligerent State, provided those affected by such seizures are given unconditional claim against the requisitioning State for a complete indemnification which shall generally be agreed upon in advance.

It cannot be denied that the principles of international law concerning the requisition of neutral goods may frequently lead to harshnesses, especially because in the case of requisitions in the occupied enemy territory there exists no assured claim to indemnification. For this reason, a disposition has manifested itself in the more recent international doctrine, to demand a more favorable treatment for at least certain categories of neutral property.

The radical opinion of Neumann,¹ that a belligerent may under no circumstances seize neutral property and that the foreigner need only submit, at most, to expropriation with regard to immovable property, has gained no adherents.

Even the theories of v. Martens,² and of Klüber,³ according to which neutrals should be subject only to such taxes as are levied on the real estate by the occupied enemy, and that their immovable property should be exempt, are but seldom referred to in our day, owing to the changed circumstances.⁴

On the other hand, another theory, one especially advocated by English authors has been gaining ground. According to this theory, goods of neutral owners which may be looked upon as permanently integrated in the one or in the other belligerent State and its territory or of its national economy, shall be subject to the same requisitions as the goods of the inlanders. Such other neutral property which by mere chance is found temporarily within the territory of one of the belligerents, shall be seized only under very special circumstances, in case of a pressing critical situation, and in such case the owners shall be entitled to an indemnification from the respective State. Neutral ships and their cargoes, as well as goods that have by way of transit come within the territory of a belligerent party are especially regarded as such property.⁵ The right of the belligerent, in cases of urgent necessity, to seize such neutral property with the obligation to make compensation, is also called "modern right of angary."

It cannot be asserted, however, that this theory agrees with the accepted international law. It cannot be shown either in the practice of the States or in their treaties that in their acts they conform to this theory. It cannot be said with certainty whether it will be accepted by the practice of the States, although it seems plausible and fair. Practice frequently follows lines other than those indicated by the theory of international law. When a definite claim to indemnification of the owner affected by the requisition shall have been recognized, the main reason for the establishment of such theories as would subject neutral property to requisitions under special conditions, will then have disappeared.

¹ *Grundriss*, 1885, p. 141 f.

² *Précis*, 1821, sec. 313.

³ *Droit des gens*, Ott ed., 1874, sec. 286.

⁴ See Kleen, *Lois et usages de la neutralité*, II, p. 60 ff.; v. König *Hdb. d. Konsularwesens* 6, p. 130.

⁵ Hall, *International Law* 3, p. 654 ff.; Oppenheim, *International Law*, II, sec. 365 ff.; Westlake, *International Law*, II, p. 117 ff.; Feraud-Giraud, p. 42 f.; Taylor, *A Treatise on International Law*, sec. 641.

BARCLAY.

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ANGARY (Lat. *jus angariae*; Fr. *droit d'angarie*; Ger. *Angarie*; from the Gr. ἀγγαρεία, the office of an ἄγγελος, courier or messenger), the name given to the right of a belligerent to seize and apply for the purposes of war (or to prevent the enemy from doing so) any kind of property on belligerent territory, including that which may belong to subjects or citizens of a neutral state. Art. 53 of the Regulations respecting the Law and Customs of War on Land, annexed to the Hague Convention of 1899 on the same subject, provides that railway plant, land telegraphs, telephones, steamers and other ships (other than such as are governed by maritime law), though belonging to companies or private persons, *may be used* for military operations, but "must be restored at the conclusion of peace *and* indemnities paid for them." And Art. 54 adds that "the plant of railways coming from *neutral* states, whether the property of those states or of companies or private persons, shall be sent back to them as soon as possible." These articles seem to sanction the right of angary against neutral property, while limiting it as against both belligerent and neutral property. It may be considered, however, that the right to use implies as wide a range of contingencies as the "necessity of war" can be made to cover.

BASDEVANT.

["La Réquisition des navires allemands en Portugal," in *Revue Générale de Droit International Public*, vol. 23, Paris, 1916, pp. 268-279.]

On March 9, 1916, the German Government declared war against Portugal. In the document which it had handed in to that effect by its minister at Lisbon, Dr. Rosen, it sets forth several unobservances of neutrality, of international law or of treaties to which Portugal had made itself liable. Of these grievances, some are old, but up to that time it had been possible to maintain peace and diplomatic relations between the two States. A single one of these grievances is new: it is that which Germany adduces from the requisition by Portugal of German merchant vessels which had sought shelter in her ports since the beginning of the European war. Upon what is Germany's complaint based, and is it founded? It is this juridical problem which I would examine: it is important both from the point of view of the opinion one may form regarding the judgment of this conflict and from that of the development, based upon customary international law in the matter of ship requisitions.

The facts are simple. At the beginning of the European war, the German merchant vessels remained within the neutral ports where they were moored at the time, or hastened to take refuge therein, in order to escape their probable capture on the part of the allied cruisers. In the first place, the German companies endeavored to have their vessels transferred to a neutral flag: the attempt was made in the United States; but it failed because of the jurisprudence consecrated by the decision of the French Prize Council rendered on August 5, 1915, in the affair of the *Dacia*,¹ which requires as a condition of validity for the transfer of the flag that, in the reasons for such transfer, the intention to remove the vessels from the effects of the right of capture be not included. Thenceforward, the mastery over the seas on the part of the allies not having failed, the German merchant ships remained unused in the neutral ports: more than eighty being kept in Portuguese waters. But, at the same time, an increase in freightage was felt, especially resulting from this unavailability of German tonnage, and from this Portugal suffered. To parry this increase, the Portuguese Government sought a remedy in the requisition of the German vessels.

On February 23, 1916, acting in virtue of a decree of that same date and of a law of February 7, the Minister of Marine requisitioned all German vessels found within the continental Portuguese waters; the Portuguese authorities took possession of them; Portuguese sailors replaced German sailors on board² and the Portuguese flag was hoisted over these vessels. The measure was subsequently extended to German vessels found within the colonial waters. The entire operation was effected by unilateral acts of the Portuguese

¹ See in this *Revue*, Vol. XXII (1915), Prize Jurisprudence, p. 83.

² Thus, the requisition applies to the vessel, a material instrument, and not to the vessel as an organized entity, with its crew, as had been the practice in the seventeenth and eighteenth centuries; subsequently, these vessels were given in the names as recorded in the *O Seculo* of March 15.

authorities, without any previous understanding with the interested German companies, nor with the German diplomatic or consular agents. Article 3 of the decree of February 23, foresees, indeed, the presence of the consul at the drafting of an inventory by the maritime authority, but adds that in the absence of the consul the act will be proceeded with in the presence of two witnesses; this same decree prescribes the determination of indemnities by a *Portuguese Commission* whose composition it defines.

The Portuguese Government had acted by way of unilateral acts, without agreement with the German Companies nor with the collaboration of the German authorities. It had merely directed its minister at Berlin to notify the imperial chancellery of the measures taken and of the provisions adopted for the settlement of the indemnities.¹ The reply was in the form of a very brief note from Dr. Rosen, imperial minister at Lisbon, protesting against the measures taken, and demanding their immediate revocation.² The Portuguese Government ignored this request, by justifying its conduct in stating that it had exercised towards the unused German vessels within its waters the rights of "eminent domain" which it had over all properties within its jurisdiction; that, in so doing, it had provided for the urgent needs of its maritime commerce, by following in this respect the example of Italy which, without leading to any objections on the part of the Imperial Government, had requisitioned the German vessels that had taken shelter within her ports. It added that the measures taken were also lawful and that the German owners would be indemnified.³

The German Government was not satisfied with this answer. On March 9 it declared war against Portugal through a note in which it referred both to old grievances and to those adduced from the requisitions of the vessels.⁴

¹ Dispatch to the Portuguese minister at Berlin of February 23, read before Congress, on March 10, by the Minister of Foreign Affairs.

² Lisbon, February 27, 1916.—Mr. Minister. I am charged by my Government to protest against the strange violation of right which the Portuguese Government has committed against the German Empire by taking possession, by an act of force, without any previous negotiation, of the German vessels found within Portuguese ports. At the same time, in the name of my Government, I have the honor to solicit of your Excellency the immediate revocation of this measure. I request your Excellency, etc.—Rosen.

³ These considerations are enunciated in the instructions given by the Portuguese Government to its minister at Berlin and which were read before Congress on March 10.

⁴ This note was handed both to the Portuguese minister at Berlin and to the Portuguese Government through the German minister at Lisbon. It was also read before the Portuguese Congress and published in the German newspapers. The following is a translation of the part concerning the requisition of the vessels:—"On February 23 the German vessels were seized in virtue of a decree of the same date and without previous negotiation. These vessels were militarily occupied and the crews landed. The Imperial Government had protested against this flagrant violation of right and demands the release of the vessels.—The Portuguese Government has refused the demand and sought to base its act of force upon juridical considerations. From the latter it concludes that war vessels, rendered unavailable by the war within the Portuguese ports, were not, in view of this non-use, subject to Article 2 of the German-Portuguese treaty of commerce and navigation, but as any other property within the country, to the unlimited territorial sovereignty, and, in consequence, to complete control of Portugal. Moreover, it believes that it has kept within the limits of this Article since the requisition of the vessels met the urgent economic need and since an indemnification to be subsequently determined had been provided for in the decree of seizure. These considerations appear as so many idle subterfuges. Article 2 refers to any requisition of German property found within Portuguese territory, so it may not be asked if the invoked immobilization of German vessels within Portuguese ports has modified their juridical status. The Portuguese Government has violated the said article from two points of view. In the first place, it has not, in the requisition, kept within the conventional limits, since Article 2 presupposes that the matter involved is one of satisfying a State need, whilst, on the other hand, the seizure has borne openly upon many more German vessels than were needed to satisfy the Portuguese shortage of vessels. In the second place, the article makes the seizure of the vessels dependent upon an agreement previously reached with the interested parties with regard to the indemnification to be granted, whilst the Portuguese Government has not once attempted to come to an understanding with the German companies, directly or through the medium of the German Government. The entire procedure of the Portuguese Government thus presents itself as a grave violation of right and of the treaty.—By this manner of acting, the Portuguese Government has shown that it regards itself as the vassal of England, subordinating all other considerations to English interests and desires. It has, finally, had the seizure of the vessels effected in such form as clearly indicates an intentional challenge of Germany. The German flag on the German vessels was carried away, and the Portuguese flag with the national colors was hoisted. The admiral's ship saluted with a salvo.—The imperial government finds itself forced to deduce the necessary conclusions from the attitude of the Portuguese Government. It regards itself, henceforth, as in a state of war with the Portuguese Government."

The Austro-German press, on its part, had vigorously protested, referring to the "theft of vessels", qualifying the requisition as a hostile act, a breach of neutrality, a disregard of treaties, declaring that it was an act of complacency towards England, and betimes, but rarely, discussing the juridical basis of the affair in a calmer tone.

Considered from this point of view, which is the one I desire to investigate, the requisition of the German vessels by Portugal constitutes the exercise of the right of angary.

But does this right of ancient origin still exist in contemporaneous international law? By reading some authors,¹ one might entertain some doubts in this regard: but these doubts could not withstand an attentive analysis, and, on the other hand, the question is without interest in the present case, because there exists a provision of conventional right. In the relations between Germany and Portugal, the right of angary has been recognized and regulated by Article 2 of the treaty of commerce and navigation of November 30, 1908.² According to this text, vessels may be requisitioned on the same grounds as all other goods or properties—under reservation of military requisitions resting on immovable property (sec. 2); but it is necessary: 1. that the requisition be for some public use; 2. that a previous indemnification be granted; 3. that this indemnification be agreed upon between the parties interested. Thus, the competence of each contracting State to requisition the merchant vessels of the other found within its ports, is recognized; the exercise of this competence is subject to certain rules. The juridical problem, therefore, consists in finding out if these rules were observed by Portugal or, in the contrary case, if the non-observance of some one of these rules is justifiable.

In the present case, the requisition was made for public use, even as the treaty required it to be. As indicated in the preamble of the decree of February 23, the matter involved was to secure means of transportation to meet the increase in freightage under which Portugal was suffering; this same justification was invoked by the Portuguese Government in the explanations which it had transmitted to Berlin.³

Without disputing the principle involved, the German Government objected that the requisition had been excessive in its scope, in view of the fact that it applied to *all* German vessels, when in its opinion it would have sufficed to employ a few to meet the economic needs of Portugal. And this controversy, no longer

¹ Kleen, *Lois et usages de la neutralité*, Paris, 1900, Vol. II, sec. 165, p. 68 ff.

² "The subjects of each of the contracting parties shall be exempt, within the territory of the other party, from all personal services in the army, in the navy, and in the national militia, also from all war burdens, compulsory loans, military requisitions and contributions of whatever nature. Their properties may not be sequestered, nor may their vessels, cargoes, goods or effects be seized for any public use whatever, unless there be granted to them an indemnification to be agreed upon between the parties interested, upon just and equitable bases.—From these are excepted, nevertheless, any charges connected with the ownership, under whatever title, of an immovable property, as well as the obligation of military quarters and other special requisitions or prestations for the military forces, to which the nationals and the subjects of the most favored nation are subject as owners, lessors or lessees of immovables."—The first paragraph of this article is reproduced from Article 2 of the treaty of March 2, 1872, between the two countries, whilst paragraph 2 is new.

³ In a dispatch to the Portuguese minister at Berlin and intended to be communicated to the imperial chancellery, and which was read by the minister of Foreign Affairs at the session of the Congress on March 10, it is stated:—Portugal was exposed to the danger of seeing her maritime commerce paralyzed as a result of the want of means of transportation, and an urgent necessity to secure vessels legitimized the exceptional measures resorted to. A like insufficiency of maritime transports impelled the Italian Government to resort to similar measures by requisitioning the vessels which had taken refuge within Italian ports, and it does not appear that the German Government raised the slightest objection against this act

one of principle, but of means, was regarded by it sufficient to declare war against Portugal. To appreciate the value of the objection, and without attempting to compare the needs of transportation of Portugal with the tonnage of the German vessels, something for which I totally lack substantial data,¹ we must also take into account a circumstance of fact. The Portuguese authorities feared that in case the requisition were scaled according to the needs and not effected all at once, the crews thus forewarned might render the vessels useless by deteriorating them. This danger was real; for even with the rapid procedure adopted, similar deteriorations were caused in rather large numbers, and the German press felt overjoyed at this. It was legitimate to endeavor to thwart such acts:² otherwise, the right of requisition, consecrated by the treaty of 1908, would have become of no effect.

Thus, this objection does really in no way affect the justice of the measure taken. To dispute this measure, the German press, if not the Imperial Government, has pretended that the requisition had been effected not in order to meet the economic needs of Portugal, but in the interest of England in order to furnish to the latter the tonnage she lacked; and it has been affirmed, in consequence, that the act of Portugal was contrary to neutrality. Portugal would thus have exercised her competence of requisition not for the purpose set forth (meet her national needs), but for an entirely different purpose. In fact, the misuse of power thus alleged has not been proven;³ Portugal suffered even as the other neutral nations, even as Spain, from the crisis reached in freightage: for herself, and not for others, she required maritime tonnage. Moreover, this grievance appears so little founded in fact, that the German declaration of war does not even refer to it.⁴

In the exercise of the competence belonging to her with regard to the requisition of the German vessels, Portugal was bound by certain rules. These rules were enumerated in the treaty of 1908. According to this treaty, an indemnification was to be granted, and this indemnification was to have been previously agreed upon between the parties interested, that is to say, with the owners of the vessels or with their representatives. But the requisition was effected without any previous agreement as to an indemnification; no agreement was reached nor even attempted with the parties interested, and the decree of February 23 provided for the fixation of the indemnities by a Portuguese Commission. It is evident that upon these points the provisions of the treaty were not observed, and this is set forth by the German Government in its protest of February 27 and in its declaration of war.

¹ It is at least certain that the increase in tonnage has been severely felt by the neutral nations, especially so by Portugal and Spain; the complaints expressed in the columns of the newspapers of the respective countries, both before and after the requisition of the German vessels, are a testimony thereto.

² In the nineteenth century, the theorists denied the right of angary admitted that acts fraudulently perpetrated to the prejudice of this right were punishable. See the summary of their doctrine in Albrecht, *Requisitionen von neutralem Privateigentum insbesondere von Schiffen*, p. 31.

³ Ireland did indeed urgently advise Portugal to requisition the German vessels; she did so through a note to her minister at Lisbon of February 17, 1916; but this does not mean that the requisition was not made for the needs of Portugal. It is natural that the latter should have come to an understanding upon this matter with Great Britain, both because of her relations with the latter and by virtue of the mastery of the seas exercised by the latter, this mastery being the reason for the presence of the German vessels in Portuguese ports. Finally, when Portugal complained that British vessels made her pay dearly for the transportation effected for her benefit, it was natural that the British Government should have replied advising her to use her right of requisition with regard to the unused German vessels within her ports.

⁴ Thus, I am spared the labor of finding out if the delicate theory of the misuse of power of which the French administrative jurisprudence has made such wide use, may be introduced into international relations and especially into matters of the kind as we are examining in the text.

In appearance, these German criticisms are of a strong nature. They vanish, however, if we bear in mind that the requisition was made in circumstances such as made inapplicable the provisions of the treaty of 1908 with which we are now dealing.¹

On the one hand, it is to be observed that in its instructions to its minister at Berlin for the purpose of furnishing explanations, the Portuguese Government refers but little to the treaty of 1908. It sets forth the fact that for more than eighteen months the German vessels had been stationed, unused, in her waters; that therein they enjoyed the protection of the Government of the Republic; that, in consequence, they are subject to the "eminent domain" of the latter which, therefore, may apply to them its right of requisition in the same way as to all other properties.² The juridical viewpoint of the Portuguese Government is as follows: the treaty of 1908 regulates the requisition of vessels in case they are *in transitu*, a fact, moreover, which is their normal situation; and in view of this situation and to insure their free course, special guarantees are stipulated consisting in the necessity of a previous indemnity and determined between the parties concerned. Immobilized for more than eighteen months they are no longer *in transitu*: they are only foreign property within the territorial zone of the Portuguese State. The requisition applicable thereto is subject, not to the treaty of 1908, but to customary international law in accordance with which the indemnity need not necessarily be determined by means of an agreement with the parties interested; it may be determined by a unilateral act of the organs of a State acting under the responsibility of the latter.³

On the other hand, supposing that this way of disregarding the treaty of 1908 might seem too radical, it must at least be acknowledged that the provision of this treaty with regard to the fixation of the indemnity by way of an agreement, encountered juridical objections which rendered it inapplicable. Could an agreement between Portugal and the owners of vessels anent placing of the latter at the disposal of Portugal and the payment of an indemnity, have been objected to by the belligerent State? It is very doubtful; for it would have constituted one of those indirect proceedings for saving a vessel from capture, and belligerents do not submit to such proceedings. Let us suppose the most complete and, hence, the least suspicious act: if one of these vessels had been sold to a Portuguese citizen, this transfer of the flag could not have been objected to by the belligerents, even as the French Prize Council decided on August 5, 1915, in the affair of the *Dacia*; ⁴ the same act of purchase effected not by a Portuguese citizen but by the Government, would on the part of the latter have

¹ Apart from that which is stated in the text, Portugal might still have pleaded the fear that if she forewarned the owners of vessels or their representatives by the initiation of parleys, this fact might have been availed of to deteriorate the vessels.

² On Mar. 14, 1916, Sir Edward Grey, in like manner, explained the conduct of Portugal before the House of Commons.

³ A certain portion of the German press has attempted to utilize, quite in a different way, the idea that the vessels had taken refuge in the Portuguese ports and that they were not *in transitu*. It declared that these vessels had come thither to secure a shelter against capture by the enemy, and that the requisition which had been visited upon them constituted a violation of the right of asylum. But this is making a strange abuse of the idea of asylum by inferring the right for the vessel to escape the competence of the local sovereign: even as political asylum merely means that the political criminal shall not be extradited, asylum within neutral waters merely means that the vessel may not be seized there by its enemy; but the rights of the local sovereign are not lost thereby. Any vessel which is forced to touch in a foreign port is none the less subject to the sovereignty of the State which has jurisdiction over such port. Nor has the German Government, moreover, appropriated the pretension above.

⁴ See in this *Revue*, Vol. XXII (1915), Prize Jurisprudence, p. 83.

constituted a violation of neutrality. To have concluded an agreement with the German companies or to have paid them indemnities, would have been acts permitting them to convert into money their fleet within the neutral ports, and this through the naval action of the allies; it would have been acting straight against this naval action, that is to say, it would have been a violation of neutrality. The rules anent neutrality had thus contradicted the rules of the treaty of 1908; they had to have greater effect than the treaty concluded between Germany and Portugal, for this treaty could not prejudice the juridical situation of non-signatory States.

To all this there must be added that apart from all considerations drawn from neutrality, the German vessels which for more than eighteen months had remained within Portuguese waters to avoid attacks of the allies could not be regarded as exempt property. Nor must we lose sight of the excesses committed by the Germans in their conduct of the war, especially on the seas. They have sunk enemy merchant ships without heeding the rules of the law prescribing that this should be done only in exceptional cases, and provided all necessary precautions are taken for the safeguarding of human lives and the preservation of the ship's papers; they have torpedoed neutral vessels in spite of the respect due them, and without the previous formality of visit; they have thus caused the death of members of crews, while in 1870 they denied the latter might be made prisoners of war; they have caused the death of innocent non-combatants or even neutral passengers; they have sown submarine mines without heed for merchant navigation. As far as possible, reparation for such damage must be secured both in the interest of neutrals and of enemy subjects of Germany. Whatever may be the political issue of the war, such reparation must be assured; it is the least that may be demanded if right is not to disappear absolutely in the course of this cataclysm. Neutrals and belligerents, victims or unharmed persons, all are alike interested in this matter. Now, as a means to cover these multiple claims for indemnification, the German vessels immobilized in neutral ports in consequence of the war, present themselves at once to the mind as a source from which to cover these indemnities. There is correlation between the naval damage and the naval reparation that might be secured through them; there is analogy between their value and the claim for reparation, and this analogy evokes the idea of a privilege bearing upon them in order to guarantee this claim. In preventing them, by naval measures, from leaving Portuguese waters, the allies have exercised a sort of seizure of them. From all this there arises the idea that these vessels are no longer exempt German property: the German navigation companies may no longer dispose of them at their pleasure. Therefore, an agreement between them and Portugal would, juridically speaking, have been inoperative, as prejudicially affecting the rights of third parties, the rights of the belligerents resulting from the rules of neutrality, and the rights of the victims of German excesses.¹

In consequence, it became juridically impossible to apply the clauses of the treaty of 1908 to the manner of fixation of the indemnity. There was only left the principle that Portugal, both according to the

¹ Moreover, Article 5 of the decree of Feb. 23, 1916, declares that the indemnification to be fixed by the competent commission shall be placed with the general treasury of deposits, in order to be handed to those entitled thereto after the restitution of the vessels. The determination of those entitled thereto is in the manner reserved.

treaty and the common law, being competent to requisition the vessels, was likewise competent to accomplish of herself through her own organs, without any cooperation and under her responsibility, the acts relative to the fixation of the indemnity.

Thus, no violation of right is imputable to Portugal.¹

The treaty of 1908 in the provision which we have studied was inapplicable in the present circumstances. Portugal has followed the only course which was juridically open to her. The grievances alleged against her by Germany are not founded, and if there has been some violation of the treaty of 1908, it is to be charged against the German Government, in the fact of having declared war instead of attempting to have recourse to arbitration as prescribed in the treaty of 1908 (Article 24) regarding disputes relative to its interpretation and its application.

This war declaration whose intentions and political effects we need not here look into, has from the juridical point of view the peculiar consequence, not of ameliorating, but of making worse the position of the ship owners whom Germany meant to protect. According to the decree of February 23, 1916, the indemnity for the requisition was to include compensation for the use of the vessels and reparation for depreciation occasioned to them.² Beginning with the war declaration, two solutions are possible, either the vessel is confiscated by reason of its enemy character, in refusing to it the benefit of the indult because its presence in the Portuguese waters at the beginning of hostilities is the result not of a commercial operation, but of the refuge which it sought there;³ or else, which would be a solution more favorable to the ship, indult is granted to it in the terms of the Hague Convention VI of 1907, but in that case it will be considered as requisitioned in its quality of enemy vessel and, according to the most exact interpretation of the Convention, it would seem, that the indemnity due will include only the reparation of deterioration.⁴ This observation when compared with an examination of the grievances is of such a nature as to suggest the idea that in this affair, in spite of the terms of the final note, the juridical considerations have but slightly affected the determinations of the Imperial Government.

This observation does not, moreover, rob this incident of the interest which it presents for the point of view of the development of right in the matter of angary. This interest presents itself under a two-fold point of view.

On the one hand, the incident furnishes us occasion to realize that the right of angary exists in contemporaneous international law. The doctrine, sometimes too far removed from the facts or proceeding in accordance with a defective method, seemed to hesitate. Certain writers concerned by its abuses and rebellious to the idea that a bel-

¹ It seems to me useless to insist upon this fact set forth, nevertheless, as an international challenge in the German war declaration, only that at the time of the seizure of the vessels the German flag was carried away and the Portuguese flag was hoisted and greeted with a salvo.

² Under reservation, of course, as has already been said hereinbefore, of the rights of third parties, allies or neutrals, to this indemnity.

³ This was the judgment in England in the affair of the *Prinz Adalbert* and of the *Kronprinzessin Cecilie*.

⁴ Dupuis, *Le droit de la guerre maritime d'après les Conférences de la Haye et de Londres*, Paris 1911, sec. 78, p. 168-169. The last interpretation given to the text is that which has been effectively applied by the Portuguese Government through the decree published in the *Diário do Governo* of April 21: Article 30 of this decree maintains the application of the decree of February 23 to requisitioned vessels, but with certain modifications and by excluding the compensation for the use of the vessel. Article 29 decides that in view of a confiscation pronounced by the Prize Court such vessels shall be seized the construction of which indicates that they are susceptible of being transformed into war vessels. In this respect, the state of war has again proven disadvantageous to the owners of these vessels.

ligerent might utilize neutral vessels, felt that they could attain their end by merely denying the existence of the right of angary:¹ they wished in this way to condemn the right of angary as it had been understood in the time of Louis XIV as a royal right whose exercise demanded no obligation to make an indemnification and which extended from the vessel to its crew. Some treaties² of ancient date, moreover, and concluded to meet a radical but excessive measure to requisition on too wide a scope, had very likely inspired them. Other authors, guided by like moral considerations, and in admitting, in principle, the right of the State to touch the property of another person, of a foreign subject, had begun to deny this "pretended" right of angary, this "putative" right; then, with the more or less embarrassing and frequently dangerous explanations, they had, nevertheless, conceded it for cases of necessity, either to meet any necessity whatever, or merely a maritime necessity:³ a contradictory exception, it seems, which tends to give greater advantage to the belligerent than to the neutral State, and dangerous because of its appeal to the idea of necessity in order to invalidate the rule of right established in the first place. Neither the one nor the other of these conceptions is in harmony with precedents: on the one hand, in 1870, the Germans had exercised the right of angary in the Duclair affair;⁴ on the other hand and above all, even like the German-Portuguese treaty, numerous treaties of commerce in the nineteenth century have admitted the right of angary without restricting it to the case of necessity, by submitting its exercise to various modalities and, especially to the payment of an indemnity; now, it is quite evident that these treaties did not intend to make navigation conditions less advantageous by creating a right of requisition which had not, therefore, existed.⁵

They have declared the existence of this right by surrounding its exercise with certain guarantees. The incident which we have just studied and before that, similar action by Italy, are new precedents which confirm this right.⁶ Upon the basis of these precedents and treaties an exact synthetic idea of positive international law may be conveyed by saying that the State within whose ports foreign vessels are found, has, in virtue of its territorial sovereignty, a right to requisition such vessels. It derives this right not from the quality of belligerent which it might have, nor from the state of necessity, but from its territorial sovereignty. In the exercise of this right it has to meet certain obligations: on the one hand it must conform to the conditions of the exercise of this competence that might be expressed in a treaty; on the other hand, it must follow the customary rules of international law, either general as those consecrating the right of foreigners to legality, or special to our subject to the extent of which such rules may exist (for instance with regard to the obligation of

¹ Kleen, *Lois et usages de la neutralité*. Paris, 1900, vol. II, sec. 165, p. 68 ff.—See also the interesting discussion at The Hague meeting of Institute of International Law (1898) and Article 39 of its regulation regarding the legal regime of vessels and of their crews in foreign ports. *Annuaire de l'Institut de droit international*, vol. XXVII, pp. 57, 63, 255-259 and 284.

² For instance, the treaty of the United States and Prussia of September 10, 1785, Article 16: it prohibits angary which, on the contrary, the treaty of July 11, 1799, which replaced it, admits.

³ Heffter, *Le droit international de l'Europe*, sec. 150: Chrétien, *Principes de droit international public*, p. 391.

⁴ Calvo, *Le droit international théorique et pratique*, vol. IV, sec. 2245 ff.

⁵ This observation was made in connection with treaties of Germany, by Albrecht, *op. cit.*, p. 44.

⁶ To this may still be added the German law of June 13, 1873, concerning requisitions which, as set down by Albrecht, *op. cit.*, p. 49, applies to ship owners, even if they are not German.

furnishing an indemnity): investigation of the contents of these rules would go beyond the object of this study.

On the other hand, the German-Portuguese incident furnishes an instance of a case in which the right of angary was exercised by a neutral State. Precedents and doctrine had up to that time referred to it as a right exercised by a belligerent State, which might have impelled minds to explain the institution by pleading the excuse of necessity, by a sort of prerogative belonging to the belligerent State as such. And this had in no small degree contributed to obscure this matter, for objections sought in the idea of neutrality were pleaded against this exercise of the requisition of neutral vessels for war purposes. With the Portuguese precedent, the right of angary has been liberated from those accessory elements which obscured it. It must quite naturally be compared with the analogous competence recognized by Article 19 of the Hague Convention V of 1907¹ to the neutral State to requisition railway material belonging to a belligerent. We find here a parallelism between the prerogatives of the neutral and those of the belligerent which does not permit of explaining them through a quality that might belong to only one of the two. We must seek for a common explanation and this is one more reason for seeing in the right of angary an application of the territorial competence of the State.

Apart from any juridical classification, in the interest of good international relations, it can be but useful to take away from a prerogative the character of prerogative of belligerency, and to make of it a prerogative common both to the neutral and the belligerent State. This has been the result of the Portuguese incident; therein we find the principle of its great importance.

¹ Article 19 reads as follows: Railway material coming from the territory of a neutral power and either belonging to this Power or to private persons, and recognizable as such, may be requisitioned and used by a belligerent only in case and to the extent of which such action is demanded through imperative necessity. As soon as possible it must be returned to the country of its origin. In like manner, and in case of necessity, the neutral power may detain and use to the same extent, material coming from the territory of the belligerent power. In each case an indemnification shall be paid according to the amount of the material used and the duration of such use.

DEN BEER POORTUGAEL.

[Het Internationaal Maritiem Recht, Breda, 1888, p. 413.]

E. THE RIGHT OF SEIZURE (DROIT D'ANGARIE).

1. *Principle*.—The right of seizure (*ius angaria*, *droit d'angarie*, Admiralty right of prestation) is that right which, according to many, a belligerent State has, in case of extreme necessity.

It is defended, among others, by Azuni, *Droit maritime de l'Europe*, 1, ch. 3, art. 5; and by De Cussy, *Phases et causes célèbres*, 1, for self-preservation, to seize for its own use, the property, that is to say, the ships of neutrals.

Only an unusually pressing necessity of war can justify the exercise of the *droit d'angarie*.

It is always expected that when seizure of this sort is resorted to, it shall be effected with those courteous formalities that are due to the subjects of friendly Powers.

Full compensation for the value of the property and complete indemnification for the persons injuriously affected by the act, are required.

It was especially Louis XIV who exercised this right, and he regarded it as a prerogative of sovereignty, so that, when he thought it absolutely necessary, with a view to maritime expeditions, he took possession of the ships that had entered his ports. Heffter (sec. 150) calls it a "pretended right." Hautefueille¹ disputes this right and regards "angarie" as an abuse of authority which can not be accounted for either by the primitive or by the secondary right. In so far as complete transfer of ownership and compensation for *all* injury to the neutral owner has not been effected by the belligerent, I share his views as regards abuse of authority. A neutral State may not, besides, render service to one of the parties, if such service is at all connected with the war.

As regards, however, the secondary (conventional, positive) right, and whilst Hautefueille may be right when he states: "il n'existe pas un seul traité, depuis que les nations ont commencé à formuler leurs conventions, qui ait, je ne dirai pas reconnu mais méms fait une simple mention du prétendu droit d'angarie," it can not be gainsaid, that, in the period up to the peace of Utrecht, in many tractates the contracting parties sought mutually and thoroughly to protect themselves, through stipulations, with regard to the exercise of that right—even although it is not directly mentioned—for instance, in article 11 of the treaty concluded in 1645 between France and Portugal; in Article 6² of the treaty of the Pyrenees, and in article 16 of the treaty of commerce, navigation and marine, con-

¹ *Nations neutres*, IV, p. 434.

² The article reads: "Ne pourront, d'un côté ni de l'autre, les marchands, maîtres de navires, pilotes, matelots, leurs vaisseaux, marchandises, denrées, et autres biens à eux appartenant, être arrêtés et saisis * * * pour quelque cause que ce soit, ni même sous prétexte de s'en vouloir servir pour la conservation et défense du pays."

cluded in 1713, at Utrecht, between France and the States General; yet, in my judgment, it cannot be maintained without reason that, being a primitive right, the right of self-preservation (*droit de conservation*), along with all things essentially serving that end, must be recognized as an integral part of that right.

Whenever a belligerent, compelled by necessity, seizes upon that which he finds ready to hand, takes possession of it and disposes of it as he sees fit and assumes full liability for all damages, then the offense against neutrality disappears, because it is no longer the neutral, but the belligerent who performs the service. In opposition to the view expressed by Hautefeuille,¹ I am of opinion that in such case, an admiral or a general is right in acting in that way. As regards the State, there may, in a war, arise such unexpected and pressing needs of self-preservation that the State can not look about or investigate to find out to whom may belong the things that may save it, or that may be of service to it in the state of necessity by which it is confronted. Provided that it make compensation for all losses occasioned, it must take and seize all that which may serve to save it, even as the drowning man lays hold upon all things within his reach. Hautefeuille says that even in that case "*le principe de l'indemnité ne pourrait justifier la violation du droit des gens*," and Gessner² shares this view; but to my mind, the principle of the "*angarie*," because of the pressing necessity for self-preservation, and, provided full and complete compensation is made, is absolutely a principle of the "*droit primitif*." In my judgment, the erroneous conception of Hautefeuille, is in part explained by the fact that he regards the ship as a "*démembrement du territoire de son Souverain*."³ In this wider sense, this is not the case as regards a merchantman. A belligerent may appropriate within his own and within enemy, but not within neutral territory. But if the fiction, that a ship is territory were true, and if it were extended to merchantmen, Hautefeuille would be right in claiming that the act is a violation of sovereignty; but even then arises the question as to whether the right of self-preservation does not outweigh all other considerations? This assimilation applies, after all, only with regard to warships, and the "*angarie*" does not extend to these.

With regard to this question, Phillimore⁴ says:

There is yet another measure, partaking also of a belligerent character, though exercised, strictly speaking, in time of peace, called by the French *le droit d'angarie*. It is an act of the State, by which foreign as well as private domestic vessels which happen to be within the jurisdiction of the State, are seized upon, and compelled to transport soldiers, ammunition, or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a Power with whom they are at peace. The owners of these vessels receive payment of freight beforehand. Such a measure is not without the sanction of practice and usage, and the approbation of many good writers upon International Law; but if the reason of the thing and the paramount principle of national independence be duly considered, it can only be excused, and perhaps scarcely then justified, by that clear and overwhelming necessity which would compel an individual to seize his neighbor's horse or weapon to defend his own life. At all events, justice demands that the owners of such goods and vessels be indemnified for all damages caused by the interruption of their lawful gains, and for the possible destruction of the things themselves, though so high an authority as M. Massé says that usage has not hitherto gone that length.

The position of a belligerent toward the subjects of neutral Powers is of course, not the same as that toward the citizens of the State with which it is at war. Therefore,

¹ *Nations neutres*, IV, p. 445.

² *Le droit des neutres sur mer*, p. 325.

³ *Nations neutres*, IV, p. 436.

⁴ Phillimore, III, p. 41, [III, p. 49, 3d ed., 1885.]

the goods of neutral subjects, no matter where they may be found, be it within one's own or within enemy territory, must, if somehow possible, be left untouched. But there is a limit to this, even in land warfare. If, for instance, the property be a castle, situated in the battle line, or a drove of cattle, when the army is suffering from want, etc., then the occupant may not expose the important war aims to danger, because of his desire not to harm the neutral property. If such property is encountered within enemy territory, it can not wholly escape the consequence thereof and is subject to the laws of the conqueror in so far as the cause of the war makes this positively unavoidable.

2. *Application of the principle in the war of 1870.*—On December 21, 1870, five English coal barges which were in ballast at Duclair, by the Seine, were seized by the Germans, in order to close the river to some French gunboats. The commanders of the vessels received a written promise for compensation of full value. The *Daily News*, the organ of the English press which discussed the affair with calm deliberation did not regard this promise as satisfactory. The sailors, unexpectedly robbed of their property and means of subsistence, must also, according to that newspaper, be indemnified.

It is said, (so ran the argument) that the English coal barges being found in a land occupied by enemy troops, had no right to expect or to demand other treatment than is meted out to the people within the territory. This is a mistake. The coal barges with the permission of the Germans, certainly not to their prejudice, had thus sailed up the river to Rouen. Therefore, they might have expected a treatment different from that of the French ships.

If such seizures are sometimes unavoidable and in war prejudicial to neutrals, then it is proper that they should be made good with adequate compensation for all prejudices occasioned.

It seems that the manner of seizing the vessels had been regarded as effected in a coarse manner and as an offense against the English flag. On December 29, the English government called upon Count v. Bismarck to give an explanation of the matter. On January 4, following, Bismarck expressed his regret about the incident, promised an immediate investigation and adequate indemnification.

On January 8, Count Bernstorff, the Prussian ambassador to London, received an additional telegram about the affair from Count Bismarck. It read as follows:

The report of the German Commander, in reference to the English ships which were scuttled in the Seine, has not been received; but the main facts are known. Inform Lord Granville that we sincerely regret that our troops, to ward off an immediate danger, were compelled by necessity to seize British vessels and that we shall accept claims for damages. We shall pay for the value of the vessels without waiting to find out by whom the compensation shall be granted. If the motives for the act are not fully justified, then the guilty shall be punished.

On January 25, Count Bismarck wrote from Versailles to the said ambassador as follows:

In continuation of my preliminary communication of the 4th, and of my telegram of the 8th of this month, I have the honor of sending you a copy of the report of the First Army Corps, regarding the sinking of English ships in the Seine, near Duclair, the drafting of which report has been delayed as a result of the many moves made by the Corps referred to.

Your Excellency will get from it the same satisfaction which I felt in learning that the measure in question, however unusual the case, did not transgress the international usages of war. From the report it appears that a pressing danger was at hand and that, to ward it off, all other means were wanting; it was, therefore, a case of necessity which, even in time of peace, admits of the use or destruction of the property of foreigners, provided compensation is made. I take the liberty of calling attention to the fact that such a right, in time of war has become the subject of a special law, the *jus angariae* which, by so high an authority as Phillimore, is thus defined; that a belligerent Power demands and makes use of foreign ships, even if not found in one's

own waters or in the ports and roadsteads of one's jurisdiction and even uses the crews for transporting troops, ammunition or other war material.

I hope that the negotiation with the owners, whereto you have been authorized already, will lead to a settlement about the compensation for damages; if not, then it shall be referred to arbitrators. In the negotiations, the discrepancy as between the declarations of the First Army Corps and those of the English Consul at Dieppe, concerning the number of ships sunk, will be explained.

I request Your Excellency, respectfully, to communicate this dispatch, together with annex, to the Secretary of State of Her Britannic Majesty, and to be good enough, at the same time, to present my apology for the delay, and the expression of my thanks to the government of Her Majesty, for the just appreciation of the military necessity, with which Lord Granville has viewed and treated this matter.

The incident of the ships at Duclair is discussed by Dahn¹ in approximately the same way.

¹ *Jahrbücher*, 1872, No. 14, p. 139.

BLUNTSCHLI.

[Das moderne Völkerrecht der civilisirten Staaten, third edition, Nördlingen, 1878
p. 447, sec. 795a.]

Within the war zones, neutral ships can not escape the measures resorted to and arising from military necessity: but the belligerent who for such reasons seizes such vessels, is obligated to make full compensation for the private property so seized.

The seizure and sinking of six English, and, hence, neutral colliers, near Duclair, by German troops, can not be explained on the basis of a right of a belligerent toward neutrals, nor can it be explained on the basis of the *jus angariarum* (*droit d'angarie*), that is to say, the right to use ships and wagons on the spot, for the necessary transportation of troops and war material, but only on the basis of the right of military authority within the war zone, to do all that which is necessary for the security of the troops. It was, indeed, a forcible violation of English property; but if it was necessary to do so for military reasons, it was justifiable as would be the forcible use of accumulated necessities of life belonging to neutrals, of course only on the condition of full compensation of the private individuals whose goods, for reasons of public welfare, must be seized. And in fact, the matter was in this way settled to the satisfaction of the English claims. (Exchange of dispatches between Lord Granville and Count Bernstorff in January 1871. *Staatsarchiv.*, von Aegidi und Klauhold, No. 4498-4509).

BONFILS.

[Manuel de Droit international public, seventh edition, Paris, 1914, secs. 328 and 1490.]

328. In case of civil troubles or of foreign war, the State may be led, in the interest of its defense or in order to better assure the secrecy of a maritime expedition, to detail for a while in its ports all merchant ships, whether national or foreign. This is *embargo*, if it prevents them from leaving without imposing upon them any duty; *angary*, in case it places these merchant vessels in requisition for the public service.¹

Writers teach us that an *embargo*, or *decree of the prince*, a measure of public interest and security for the State, ought to be general, based upon substantial reasons, and not involving the moral responsibility of the Government. Geffcken² remarks that with the rapidity of telegraphic communication, embargo is no longer anything but a kind of reprisal, and that on this principle it can not give rise to an indemnity.

Angary is a special measure involving the financial responsibility of the State which has recourse to it. It should be used with great care, for *angary* creates disturbance in the commercial operations of a ship, prolonging its voyage, interfering with the return cargo, modifying the insurance, and in case of war it destroys the neutrality and exposes the ship to being captured. In practice the State is considered as bound to settle and pay in advance any indemnity due for this requisition. The question of liability for the act of embargo or *angary* is sometimes settled by treaties (treaties between France and Chili, June 30, 1852, art. 3; France and Nicaragua, Apr. 11, 1859, art. 5; France and Peru, Mar. 9, 1861, art. 5; Colombia and Peru, Feb. 18, 1870, art. 3; Peru and United States, Sept. 6, 1870, art. 2; Germany and Spain, Mar. 30, 1868, art. 5; Germany and Portugal, Mar. 2, 1872, art. 2; etc.).³

1490. (f) The ships of neutrals can not be captured on the high seas by belligerents even in case of urgent necessity.⁴

Belligerents, being much inclined to misuse their power, have thought to employ neutral vessels in their maritime expeditions. This is the right of *angary*, which although generally suppressed in time of peace is still practiced in time of war. In a number of treaties the contracting parties have renounced the exercise of this pretended right.

¹ On embargo and *angary*, see the regulations of the Institute of International Law, adopted at The Hague in 1898, *R. D. I. P.*, Vol. V, pp. 847 to 857; *Annuaire de l'Institut*, Vol. XVII, p. 273 et seq.

² Geffcken on Heffter (sec. 111, notes 2 and 3).

³ Perels, *Manuel de droit maritime*, 1884, pp. 179 to 253.—Heffter, secs. 111 and 150.—Massé, *Droit commercial*, sec. 321. Certain of these treaties have stopped placing *emlargo* on foreign ships and provide them indemnities in case of infraction of this rule. (*R. D. I. P.*, Vol. II, p. 343, note 1: Chrétien, *Principes de droit international*, p. 391.)

⁴ What of the case of ships belonging to the country that constitutes a part of the belligerent State but is occupied and administered by a neutral power? Ought these vessels to be treated as belligerents or as neutrals? The question was raised in 1912 during the war between Italy and Turkey apropos of the vessel *Tuziurichis*, belonging to Cyprus, a part of Ottoman territory but occupied and administered by England. The Italian prize commission on May 22, 1912, treated this vessel as neutral, and therefore not liable to be captured by Italian war ships. (Coquet, *R. D. I. P.*, Vol. XX, p. 510, note 1.)

Incontestably admitted by international practice, is the right of *angary* legitimate? Is it not a violation of the rules of neutrality committed by the belligerent which forces the neutral to assist indirectly in operations of war? Nevertheless, Heffter admits it in case of extreme necessity. Geffcken says that in the absence of treaties the exercise of this right can not be opposed.¹

¹ Geffcken on Heffter, sec. 150; Perels, *Manuel*, sec. 41.

CALVO.

[Dictionnaire de Droit international public et privé, Berlin, 1885, vol. 1, p. 47.]

ANGARIE. On appelle ainsi, en droit maritime, les prestations et les obligations qu'un souverain impose aux navires arrêtés dans ses ports ou sur ses plages, comme de transporter pour lui, en temps de guerre, des soldats, des armes, des munitions, mais moyennant indemnité; en résumé, l'angarie est la mise en réquisition d'un navire marchand pour un service quelconque.

Le droit d'angarie fait partie des prérogatives de la souveraineté; aucun navire ne peut se soustraire à l'obligation des angaries; mais l'exercice de ce droit, en raison des risques et des charges qu'il impose au navire qui le subit, engage la responsabilité, matérielle et financière de l'État qu'une nécessité d'ordre supérieur entraîne à y recourir. La règle universellement consacrée en cette matière est que le gouvernement de cet État ne soit pas seulement responsable des conséquences matérielles de l'angarie, pour le navire qui en est l'objet, mais encore qu'il soit tenu, avant d'imposer la réquisition, de débattre avec les ayant-droit et de solder l'indemnité due pour le service réclamé.

Du reste le droit d'angarie appartient par sa nature aux droits imparfaits, et un grand nombre de traités en ont formellement interdit l'exercice ou subordonné l'emploi au paiement préalable d'une juste compensation judiciaire. (Voir les traités conclus par la France avec le Chili en 1851, avec le Guatemala et le Venezuela en 1854, avec la Nouvelle Grenade en 1856, avec le San Salvador en 1858, avec le Nicaragua en 1859, avec le Pérou en 1861.)

COBBETT.

[Cases and Opinions on International Law, third edition, London, 1913, Part II, pp. 261, 268-269.]

Property belonging to neutrals, which is only temporarily or accidentally within a belligerent State, is not associated with it to the same extent as that of resident neutrals, and is not, in general, subject to the ordinary incidents of war.¹ Nevertheless—under a recognized custom of war, commonly referred to as the *jus angariae*²—even such property may be used or destroyed by a belligerent, provided it can be shown that such a proceeding was required by the necessities of war, and subject to the payment of a proper indemnity. In the same war the Germans, under the same plea of justification, seized and used a large quantity of rolling stock belonging to Swiss and Austrian railways.³ The seizure of railway material belonging to neutrals is, however, now regulated by Convention.⁴ The right in question also extends to the detention of neutral ships found within the belligerent jurisdiction where this is required for military reasons. So, during the American civil war, the *Labuan*, a British merchant vessel, was detained by the United States authorities, in order to prevent the divulgence of important information with respect to a military expedition then about to be dispatched; an indemnity for the detention having subsequently been paid.⁵

THE PROPERTY OF NON-RESIDENT NEUTRALS; THE RIGHT OF ANGARY (p. 268).

A belligerent has also a right to use or destroy neutral property which is only temporarily or accidentally within his territory or control, subject in this case, however, to proof of military necessity, and to the payment of a proper indemnity. This right on the part of a belligerent is sometimes described as a right of angary.⁶ This was originally a royal prerogative,⁷ under which European sovereigns claimed a right of impressing vessels, whether domestic or foreign, found within their waters,⁸ for the purposes of transport in time of war. That such a claim was far from being unusual may be gathered from the fact that its exercise was frequently guarded by treaty, and that such treaties continue down to the 18th century. It is still recognized by some writers; although in this form it is practically obsolete and scarcely likely to be revived.⁹ The right of a belligerent to use or destroy neutral property temporarily within his power—

¹ Except the risks arising out of the actual conduct of hostilities.

² *Infra*, p. 268.

³ Hall, 742.

⁴ *Infra*, p. 269.

⁵ See Moore, *Int. Arb.* iv, 3791.

⁶ Or *droit d'angarie*.

⁷ Itself derived from the *jus angariac* of Roman law, under which provincial Governors exercised a right of impressing means of transport.

⁸ Or, according to some, even on the high seas, although this was probably always irregular.

⁹ See Taylor, 702; Hall, 741, n.

although sometimes known by the same name—really rests not on any royal or official prerogative but on military necessity; and may take effect on any kind of property so long as it is within belligerent territory and under the belligerent's control. Its application to neutral vessels and the usual terms of indemnity have already been described.¹ Its application to railway material is now regulated by the Hague Convention, No. 5 of 1907, which provides—(1) that railway material belonging to neutral States or individuals shall not be seized by a belligerent except in the case of and to the extent required by absolute necessity, and shall in such case be sent back as soon as possible; (2) that a neutral Power shall have a corresponding right to retain and use railway material coming from the territory of that belligerent; and (3) that compensation shall be paid on either side in proportion to the material taken and the duration of its use.²

¹ See p. 260, *supra*; and on the subject of angary in general, Hall, 741; Westlake, ii. 117; Oppenheim, ii. 447.

² See Art. 19.

DANA.

[Wheaton's Elements of International Law, eighth edition, Boston, 1866, p. 373.]

But embargo has been employed for a still different purpose; that is, to gain possession of neutral vessels found in port on the breaking out of a war, to be used for transportation of munitions or troops, or for other temporary belligerent purposes. It is difficult to distinguish this from the seizure of innocent neutral vessels, at any later period of the war, for the use of the belligerent government. This act is called *Angaria*, or *le droit d'Angarie*, or *Prestation*. It is a kind of forced loan or pre-emption, attempted to be justified only by the necessities of war, and always accompanied with compensation. It has had the sanction of usage and of good writers. (Massé, *Droit Comm.* tit. 1, ch. 2, §§ 5, 7. Azuni, tit. 1, ch. 3, art. 5.) Massé even says that indemnity for injuries received, in addition to compensation for use, in nature of damage, is not established by usage. (Tit. 1, ch. 11, sec. 2, § 5, No. 324.) Phillimore (iii. 42) thinks the practice to be excused, rather than justified, only by an overruling necessity, and that the act should be accompanied by full indemnity. By this he means, we may presume, that it is not a right at all, but an act resorted to from necessity, for which apology and compensation must be made, at the peril of war; in other words, that it is a violation of a right. The treaties between the United States and Prussia of 1785, 1799, and 1828 (*U. S. Laws*, viii. 92, 170, 384), and with Venezuela in 1830 (*U. S. Laws*, viii. 470), provide that, in case of war between one of the contracting parties and another nation, the vessels of the other contracting party shall not be liable to be detained and used for any military expedition or other belligerent purpose, otherwise than as those of the most favored nations; and that compensation shall be made. These treaties certainly seem to recognize this *angaria* as a right, or at least as a practice of nations, and only seek to regulate its exercise. Heffter (§ 150) speaks of *angaria* as either entirely prohibited by modern treaties, or as allowed only in case of urgent necessity and upon terms of full indemnity.

The truth seems to be, that the violence of early times, and occasional acts in modern times under urgent necessity, and some recognitions in later treaties, have led commentators to place in the category of rights, in connection with embargo and reprisals, what in fact is only an occasional and not unlikely exercise of power by a belligerent, without right.

GEFFCKEN.

[“Die Neutralität,” in Handbuch des Völkerrechts, vol. 4, Hamburg, 1889, pp. 771–8.]

SECTION 168. ANGARIES.

The property of neutrals within enemy territory shall, as far as possible, be spared; but the owners have no legal claim thereto. As long as they are within the territory, they are subject to its jurisdiction and share its vicissitudes both with regard to their persons and to their possessions. They are obliged to submit to the directions which the belligerent, after his occupation of the enemy territory, may issue, and are subject to his requisitions and their services even as the subjects of the State; they have not the right to leave a besieged fortress. Hence, they can not demand any privileges with regard to their property; the belligerent is entitled to appropriate that property when the necessity of war requires it. Even although States have in treaties mutually renounced this right, it is but proof of the fact that without such an agreement neutrals can not resist the exercise of this right.¹

The treaties which state that the property of the respective subjects cannot be seized without a previous agreement of the parties involved for a fair indemnification refer, in general, only to property “dans le territoire de l'autre partie”, and, therefore, are not simply to be extended to the enemy territory momentarily occupied. So it is stated in Article 5 of the treaty between the Zollverein and Spain, of March 30, 1868; of Article 2 of the treaty between Germany and Portugal of March 2, 1872. The treaty between the United States and Prussia of September 10, 1785, Article 1, does not make this reservation and merely declares: “que les sujets, leurs vaisseaux ni effets ne pourront être assujettis à aucun embargo, ni retenus de la part de l'autre pour quelque expédition militaire, usage public ou particulier de qui que ce soit”, and then further refers to requisition for debts or for crime. Article 16 of the treaty of July 11, 1799 between these same States declares, on the other hand, that the ships of the other party are subject, even as the ships of the most favored nations, to an embargo of the other party, for all or particular ports, but that they shall receive compensation. This, therefore, does not extend beyond the territory of the contracting parties. The treaties of the Zollverein with Mexico of August 28, 1869, Article 13, and of Germany with Salvador of June 13, 1870, Article 16, do not make this reservation.

In the absence of contractual stipulations, we must distinguish two cases of the *jus angariae*, in the first place, the case of the

¹ So said W. Pitt: “The very circumstance of making an exception by treaty, proves what the general law of nations would be, if no such treaty were made to modify or alter it.” (Speeches, III, p. 227.)

mere destruction of neutral property in consequence of the necessity of war, and in the second place that of the seizure of such property by the belligerent for his own use. In the first case, the belligerent is not obliged to make compensation. The English ambassador in Berlin was therefore not justified in stating in a note of December 30, when the German army commander, in December 1870, in order to meet a pressing danger, found himself compelled to close the Seine and to that end seized and sunk, near Duclair, some English colliers, that this act was "altogether unwarrantable". Count Bismarck was right when in Versailles, on January 28, 1871, he replied to Mr. Ode Russell that this extraordinary measure did not exceed the limits of international war customs; that the report of the commander showed that he had been confronted with a pressing danger and that every other means to meet that danger had been wanting; that a belligerent had the full right to seize neutral ships in the territorial waters of the enemy, if necessary for self-defense, and that the duty to indemnify for this act did not rest upon the belligerent, but on the State where such ships were stationed; that if the victorious belligerent were to admit a right to compensation of neutrals for property belonging to them and destroyed within enemy territory, the door would be opened to new and inadmissible principles for carrying on the war, and day after day, such claims from neutrals owning property in France would be laid before him, claims which he could not admit; that merely because of his friendly sentiments for England, he would in this case waive his right and consent to an indemnification. In accordance with an estimate of the English Government, the sum of 7073 pounds sterling was paid to the parties interested. (*Staatsarchiv* 21 No. 4498-4509.)

If on the other hand, the belligerent uses for his own ends the property which he has captured, then he is bound to make compensation. It is true that this has not been done always; at least, it is not known that Napoleon indemnified neutral ships which he seized for the purpose of his expedition to Egypt; but this is, nevertheless, an acknowledged fundamental principle, for instance, when the belligerent finds provisions, railroad carriages or ships, within enemy territory, belonging to neutral subjects and which he uses for the support or for the transportation of his troops. That the personnel of such means of transportation may be compelled to assist in such service, this has not been stated by Phillimore, whom Count Bismarck refers to in his dispatch of January 25, 1871, as regards the right of angary, nor can it be upheld.

HALL.

[A Treatise on International Law, fourth edition, Oxford, 1895, pp. 690, 765.]

SECTION 247. In strictness every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to pre-emption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at ten per cent. on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband.¹

The general principle that neutral property in belligerent territory shares the liabilities of property belonging to subjects of the state is clear and indisputable; and no objection can be made to its effect upon property which is associated either permanently or for a considerable time with the belligerent territory. But it might perhaps have been expected, and it might certainly have been hoped, that its application would not have been extended to neutral property passing within a belligerent State. The right to use, or even when necessary to destroy, such property is however recognized by writers, under the name of the right of angary;² its exercise is guarded against in a certain number of treaties;³ and when not so guarded against,

¹ Phillimore, iii. s3cs. cclxviii-lxx. Rules for ascertaining the value of the merchandise seized, and for other matters of detail connected with the practice, were laid down in the treaty between Great Britain and the United States in 1794, and in that between the former country and Sweden in 1803. M.M. Heffter (sec. 161) and Calvo (secs. 2517-8) look upon pre-emption not as a mitigation but as an intensification of the privileges of a belligerent; but they start with assuming that it is only used with respect to articles not contraband of war. That much of the merchandise to which pre-emption was applied during the wars of the end of last century was not rightly considered to be contraband, does not alter the fact that, being considered to be contraband, it was rightly dealt with. M. Heffter however seems to admit that pre-emption may be permitted on payment not merely of ordinary mercantile profit, but of such profit as would probably be realised if the voyage were completed. M. Ortolan (ii. 220-30) understands the theory of the English practice, but is debarred by his views as to the proper definition of contraband from recognising any occasions on which it could be exercised. Mr. Bluntschli (secs. 806 and 811) thinks that 'contrebande de guerre ne peut être confisquée que lorsque les neutres prêtent secours et assistance à l'adversaire, c'est à dire lorsqu'ils agissent en ennemis; la saisie ne pourra avoir lieu lorsque les neutres font simplement du négoce.' To use his own example, if coal is found to be on its way to a port where a belligerent fleet is at anchor, it may be detained on compensation being made to the owner, but it cannot be confiscated unless the intention of delivering it to the enemy's fleet can be proved. He is silent as to any different rule being applied to munitions of war. He does not state where the authority for this doctrine is to be found; but as its adoption would be tantamount to sweeping away the whole law of contraband, it can hardly be admitted on the word of a single writer, however distinguished he may be. An ostensible destination to a belligerent government agent or to an armed force would hardly ever be necessary; and it is needless to say that merchandise would in consequence never be open to condemnation. And as a market with a good profit would be certain, whether the adventure were captured or arrived at its destination, no check would exist by which the trader could be restrained. Finally, as the merchant would be without risk, the belligerent would be relieved from the necessity of paying war-prices for his goods.

² In the end of last century de Martens said (Préface, sec. 26^o, ed. 1789) that 'it is doubtful whether the common law of nations gives to a belligerent except in cases of extreme necessity, the right of seizing neutral vessels lying in his ports at the outbreak of war, in order to meet the requirements of his fleet, on payment of their services. Usage has introduced the exercise of this right, but a number of treaties have abolished it.' Azuni, on the other hand, treats it as a right existing in all cases of 'necessity of public utility,' and declares any vessel attempting to avoid it to be liable to confiscation. Droit Maritime, ch. iii, art. 5.

Of recent writers Sir R. Phillimore (iii. sec. xxix), and Mr. Heffter (sec. 150), unwillingly, and M. Bluntschli (sec. 795 bis) less reservedly, recognize the right.

³ Stipulations forbidding the seizure of ships or merchandise in times both of peace and war for public purposes were not uncommon in the end of last century, but they do not appear after the early years of the present century.

it has occasionally been put in practice in recent times with the acquiescence of neutral States. In a large number of treaties the neutral owner is to some extent protected from loss by a stipulation that he shall be compensated;¹ and it is possible that a right to compensation might be generally held to exist apart from treaties.

The most recent cases of the exercise of the right of angary occurred during the Franco-German War of 1870-1. The German authorities in Alsace, for example, seized for military use between six and seven hundred railway carriages belonging to the Central Swiss Railway, and a considerable quantity of Austrian rolling stock and appear to have kept the carriages, trucks, &c. so seized for some time. Another instance which occurred nearly at the same moment attracted a good deal of attention, and is of interest as showing distinct acquiescence on the part of the government of the neutral subjects affected. Some English vessels were seized by the German general in command at Rouen, and sunk in the Seine at Duclair in order to prevent French gun-boats from running up the river, and from barring the German corps operating on its two banks from communication with each other. The German commanders appear to have endeavoured in the first instance to make an agreement with the captains of the vessels to sink the latter after payment of their value and after taking out their cargoes. The captains having refused to enter into any such agreement, their refusal was by a strange perversion of ideas 'considered to be an infraction of neutrality,' and the vessels were sunk by the unnecessarily violent method of firing upon them while some at least of the members of the crew appear to have been on board. The English government did not dispute the right of the Germans to act in a general sense in the manner which they had adopted, and notwithstanding the objectionable details of their conduct, it confined itself to a demand that the persons whose property had been destroyed should receive the compensation to which a despatch of Count Bismarck had already admitted their right. Count Bismarck on his side, in writing upon the matter, claimed that 'the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usage;' but he evidently felt that the violence of the methods adopted needed a special justification, for he went on to say, 'the report shows that a pressing danger was at hand, and every other means of meeting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification.'²

¹ These treaties are all made with Central or South American States.

² D'Angeberg, Nos. 914, 920, 957; *State Papers*, 1871, lxxi. c. 250. A considerable portion of the French expedition to Egypt in 1798 seems to have been carried in neutral vessels seized in the ports of France. De Martens, *Rec.* vii. 163; and compare an order of Napoleon for the seizure for that purpose of some vessels in Marseilles (*Corresp.* iv. 101).

HALLECK.

[International Law, fourth edition, London, 1908, vol. 1. p. 519.]

SECTION 30. The *ius angariae* is a right, denoting compulsory service. It is of great antiquity, being referred to in the New Testament (Matt. v. 41). By virtue of this right, neutral vessels, within the territorial waters of a belligerent, may be appropriated by a belligerent, on payment of a reasonable price for compensation. It is akin to the right of *prestation*, by which neutral vessels may be hired by a belligerent, on payment of freight beforehand, and to embargo or *arrest of princes*. Hautefeuille, Massé, and other writers speak of this right as being of a belligerent character, though exercised in time of peace. During the Franco-Prussian war, 1870, the Prussian troops sank six British vessels in the river Seine. This act was defended by Prussia on the ground of military necessity, although, on the demand of the British Government, an indemnification was subsequently made.¹

¹ *Parl. Papers*, 1871, vol. 71: *Ann. Reg.* 1871.

On July 25, 1834, upon the outbreak of the Chino-Japanese war, the British vessel 'Kow-shing,' chartered to carry certain Chinese troops and ammunition, was captured by the Japanese fleet, and was sunk upon the refusal of the Chinese on board to allow the master to steer his vessel in the train of the Japanese cruiser 'Naniwa' as directed.

By the Civil Law, a king is justified in pressing into his service or seizing ships of every description and of any nation, which may be found in his ports, for purposes of urgent necessity, but, nevertheless, a tacit condition of safe return is annexed to such seizure or pressing. By the ancient laws of England, the admiral might arrest any ship for the king's service, and after he or his lieutenant had made a return of the arrest in chancery, the owner of the ship could not plead against such return, because 'l'admiral et son lieutenant sont de record.' (*Black Book Admir.* fol. 28-29 and 157-158, 15 R. II. c. 3.)

Further, it is evident, from the ancient writs and patents of England, that the Admiral, the wardens of the Cinque Ports, and others, were ordered to arrest and provide ships of war and other vessels, as well as to impress mariners, and collect provisions and arms for the defence of Great Britain. (And see *Rot. Scotize*, 10 E. III. m. 2-17, 34.)

For a national defence in war, it is legal to pull down or injure the property of a private person; this is in accordance with the principle, *Salus populi suprema lex*. (See *Governors v. Meredith*, 4 *Term R.* 7. 6.)

HOLLAND.

[The Laws of War on Land, Oxford, 1908, p. 68.]

RAILWAY MATERIAL.

“139. Railway material coming from the territory of neutral Powers, whether belonging to those Powers, or to private companies or individuals, and capable of being identified as such, cannot be requisitioned or employed by a belligerent, unless in the case of, and to the extent required by, absolute necessity. It shall be sent back, as soon as possible, to the country to which it belongs.

The neutral Power may similarly, in case of necessity, keep and employ, in the meantime, material belonging to the territory of the belligerent Power.

Compensation shall be paid, on either side, in proportion to the material employed and the duration of its employment.” (The Hague Convention No. V of 1907.)

This article was suggested on behalf of Luxemburg, essentially a country of transit. It empowers, as will be observed, the neutral from whose territory the requisitioned railway plant has come, to supply its place for the time with railway plant which has come into its territory from that of the belligerent Power which authorized the requisition.

As to compensation, cf. Art. 114 (H. R. 54) .

140. Property of neutrals of other kinds, found in territory which is the scene of hostilities, even though not placed by them at the disposal of the enemy, is liable to be taken possession of, or even destroyed, for strategic reasons, by either belligerent; but compensation must in this case be made, by the belligerent so acting, to the neutral owners for the loss they have sustained.

KLEEN.

[Lois et Usages de la Neutralité, vol. ii, 1900, p. 68.]

SECTION 165. ANGARIE.

Est illicite le fait par un belligérant de s'emparer d'objets neutres sur le théâtre de la guerre dans le but de s'en servir pour les opérations.

Un des abus les plus blâmables dont se soient rendus coupables des belligérants dans des moments d'excès, a consisté dans la saisie d'objets de propriété neutre se trouvant sur leurs territoires ou sur ceux de l'ennemi, dans le but de les employer à leurs propres besoins ou pour les opérations de la guerre. Les choses ainsi prises ont pu être de nature diverse. Le plus souvent c'étaient des navires, emmarinés ou non, quelquefois du matériel de locomotion terrestre, qui furent saisis sur le théâtre de la guerre en dépit des protestations et des avertissements de leurs patrons ou propriétaires neutres, pour servir à des expéditions, des transports militaires ou autres opérations contre un ennemi, ou pour être même détruits dans un tel but. Comme ces actes constituaient des infractions trop manifestes à l'inviolabilité de la propriété neutre, l'excuse en fut naturellement la même que celle qui couvrait les autres violations de la neutralité: on tâcha de s'en disculper en les qualifiant de mesures de "nécessité" et en étouffant les réclamations par des allocations de dommages-intérêts aux lésés. C'est même sous cette égide que l'on est allé quelquefois jusqu'à vouloir les légitimer théoriquement, en soutenant—malgré la contradiction entre un doit et une nécessité sensée capable d'en suspendre l'exercice—leur fondement dans le droit international, où l'usage en a figuré sous le nom de *jus angariae* (ou *angariarum*) et fréquemment on s'est plu à traduire ce terme par l'expression "*droit d'angarie*," expression qui offre le danger d'égarer la conscience du droit.

La notion de l'angarie a souvent été confondue avec celle de l'embargo et des prestations (§§ 163-164). Il importe de distinguer nettement entre ces différentes lésions. L'angarie diffère de l'embargo par le fait que, dans la règle, elle n'est pas limitée à un simple arrêt ou séquestre mais qu'elle implique l'emploi de l'objet saisi au profit de l'usurpateur, et que cet objet peut aussi être autre chose qu'un navire. Et elle diffère de la prestation—même lorsque celle-ci s'effectue par la propriété des violentés—en ce que l'emploi s'en fait dans les mains de l'usurpateur et non dans celles des propriétaires. D'ailleurs l'angarie a cela de commun avec les dites autres violations, que son exercice n'a pas toujours été restreint à l'état de guerre et de neutralité: il y a eu des cas d'angarie en temps de paix aussi. Et toutes ces diverses sortes de violations peuvent être combinés dans un seul et même acte, par exemple l'angarie avec la prestation et la presse si un belligérant s'empare d'un navire neutre, le détruit dans le but de créer des obstacles à un ennemi, et force l'équipage du navire à lui prêter aide pour cela dans les travaux. Les notions n'en

restant pas moins distinctes, malgré de telles combinaisons dans la pratique.

Le prétendu droit d'angarie fut stipulé par plusieurs conventions entre les Etats au commencement de l'ère moderne, et l'application dans les guerres n'en était pas rare. On en rencontre des cas surtout dans les campagnes de Louis XIV, toujours avec la prétention que c'étaient là des actions légitimes. Bonaparte s'en servit lors des préparatifs pour son expédition d'Egypte, en faisant main basse sur des navires neutres dans les ports français de la Méditerranée pour les employer au trajet. Toutefois l'usage n'est plus consacré dans les traités conclus postérieurement à l'époque de Louis XIV, plusieurs d'entre eux l'interdisent même expressément.

Dans la doctrine, quelques publicistes anciens répètent l'assertion de sa légalité. Azuni, par une confusion des pouvoirs exécutif et judiciaire, considère l'angarie comme suffisamment justifiée, d'abord par le principe de la souveraineté sur les territoires nationaux ou occupés, puis par la "nécessité," enfin par le dédommagement. Massé semble bien reconnaître ce qu'il y a d'injuste dans l'acte comme tel, mais il le déduit néanmoins, par une étrange contradiction, de la souveraineté territoriale et en constate l'usage.¹

Aujourd'hui, ce qui tâchent de la justifier sont décidément en minorité, et ils présupposent toujours que réparation pleine et entière soit faite.²

Toutefois, et bien que la plupart des publicistes de l'âge moderne qui s'occupent de la matière, condamnent cette violation de la propriété neutre, ils ne le font que par degrés et pas à pas, les plus anciens en hésitant et en faisant des réserves, et ce n'est qu'aujourd'hui que ces réserves, diminuant progressivement et avec chaque génération de la science, ont enfin évacué complètement le droit positif.

Grotius donne lui-même le ton de ce marchandage. Tout en réprouvant le principe qui prend la nécessité pour prétexte d'une saisie de biens neutres, il ajoute que, du moins, une nécessité pareille, pour être valable, doit être "extrême" et ne pas exister également chez le propriétaire, que du reste, même quand elle est réelle, elle ne justifie aucune saisie au delà du strict nécessaire, aucun emploi où la détention suffirait, aucune appropriation où l'emploi suffirait, et que les choses prises doivent être payées.

L'angarie ainsi désapprouvée en principe et restreinte au *minimum*, n'était pourtant pas franchement proscrite. Cette irrésolution chez le père du droit des gens moderne explique l'hésitation de ses successeurs. G.-F. de Martens excepte, lui aussi, le cas de nécessité extrême, Klüber ceux de nécessité absolue, de la défense

¹ Azuni, *Droit maritime*, t. I, ch. iii, art. 5; Massé, t. I, p. 280, liv. II, tit. i, ch. 2, sect. 2, §§ 5-7.

² Hall, pp. 693-694; F. de Martens, p. 342; Ferguson, sec. 251; Rivier, p. 328.—Perels avait pris parti pour l'angarie dans son ouvrage précité (sec. 41); mais, arrivé à un plus haut degré de maturité, il déclare aujourd'hui, dans une critique récemment publiée, qu'elle "manque de fondement dans le droit international" (v. *Marine-Rundschau*, Berlin 1893, 8/9 Heft, p. 936).—Bluntschli se contredit sur point. Après avoir, sous sec. 793, établi comme de juste que "ce serait une grande violation des droits des neutres que de s'emparer de navires neutres pour le transport de troupes ou de matériel de guerre", il modifie plus loin (sec. 796 bis) son avis au point de dire que "les navires neutres ne peuvent pas se soustraire, sur le théâtre de la guerre, aux mesures nécessitées par les opérations militaires", que "les autorités militaires belligérantes ont le droit de faire sur le théâtre de la guerre tout ce que la sûreté des troupes exige", et que le droit d'angarie permet aux belligérants de "faire usage des bateaux et voitures" (neutres?) "pour le transport des troupes et du matériel nécessaire".—Qui jugera, hors le belligérant intéressé dans l'affaire, ce que "la sûreté des troupes exige", quelles mesures sont "nécessitées par les opérations militaires", quels transports sont "nécessaires", etc.? Il est évident qu'en laissant par des expressions aussi élastiques les droits des neutres à la merci de l'interprétation subjective de l'intéressé, bien qu'ils soient établis en termes formels en tête de sa théorie, Bluntschli les détruit dans l'application après les avoir posés en principe.

aux belligérants de s'emparer dans leurs ports de navires neutres pour des buts de guerre. Phillimore, déjà plus sévère, mais encore un peu hésitant, dit que cela pourra seulement être "excusé", et alors "peut-être à peine" justifié, par une nécessité évidente et imminente telle que "celle qui pousserait un individu à se saisir du cheval ou de l'arme de son voisin pour défendre sa propre vie." Limiter un usage à des cas pareils, équivaut naturellement en réalité à sa condamnation, puisque le danger de mort "excuse sans la justifier" une infraction quelconque à la loi. On n'excuse que des fautes; or, il s'agit ici des préceptes du droit international et non d'excuses pour des fautes commises contre ceux-ci. Même des faits qui autrement seraient punis comme des vols, sont excusés lorsqu'ils ont été commis sous le coup d'une mort imminente ou pour se défendre contre un danger de mort. Cela donne lieu tout au plus à des circonstances atténuantes, non pas à une justification, ni même à un acquittement. Du reste, ce n'était guère dans des cas semblables que jamais les belligérants s'emparaient de biens neutres.—Heffter encore, estime que l'angarie—qu'il qualifie de "droit putatif" et "*imaginé* par les belligérants portés à abuser de la force qu'ils ont entre leurs mains"—"n'est *excusable*" (donc pas justifiable) "qu'au cas de nécessité extrême." Gessner s'associe aux avis de Heffter et de Phillimore, et déclare en outre que "le procédé désigné sous le nom de droit d'angarie n'a pas de fondement en droit international," et que "il conserve son caractère de violence *même après dédommagement* complet accordé au propriétaire."

D'ailleurs, tous ces publicistes exigent le dédommagement indépendamment de la question de savoir s'il y a excuse ou non.¹

A part les contradictions, il y a certainement dans ces derniers énoncés une condamnation complète. Elle devient plus complète encore, et au surplus libre de toute restriction et de toute hésitation quelconques, chez les auteurs et autorités qui jugent ces sortes d'actes du point de vue strictement juridique. Selon Hautefeuille, Neumann, Bulmerincq, Fiore, etc., enfin l'Institut de droit international, l'angarie est une véritable infraction au droit des gens, une violation de la pire espèce du droit de propriété neutre, et cela, n'importe qu'une "nécessité" soit alléguée ou non, qu'il y ait réparation ou non.²

Évidemment, c'est là la seule manière de voir qui soit tout à fait correcte. Le fait de prendre la propriété d'autrui, sans faute commise par lui et sans état de guerre entre les deux, reste délictueux indépendamment de toute question de nécessité de réparation matérielle, supposé même que le dédommagement pût réparer le mal causé par la rupture d'un contrat ou la destruction de son objet, supposition que n'est que rarement fondée. Un vol n'en est pas moins un vol parce que le malfaiteur était dénué de ressources, pas même s'il rend l'objet volé ou sa valeur au propriétaire. Cet axiome juridique conserve sa validité dans les rapports du droit public tout aussi bien que dans ceux du droit privé: même dans les relations internationales, tout propriétaire de bonne foi a la prétention légitime de ne pas être dépouillé de ce qui lui appartient. Il n'y a pas

¹ Grotius, cap. XVII, sec. 1; G.-F. de Martens, sec. 269; Klüber, sec. 286; Phillimore, sec. 29, pp. 50-52; Heffter, sec. 150; Gessner, p. 340.

² v. surtout Hautefeuille, tit. XIV, ch. i; Neumann, sec. 50, p. 142; Fiore, sec. 1586; Ullmann, p. 304; Ann., t. XVII, p. 284.

même l'autorité officielle qui puisse le forcer, contre sa propre volonté, à s'en désister ou à le vendre en dehors de la loi d'expropriation, qui toutefois n'a force qu'à l'égard de la propriété foncière. Quant aux navires, aux moyens de transport et autres biens meubles, un belligérant n'a pas plus qu'un autre État quelque droit d'exproprier l'étranger: il ne peut donc à aucune condition disposer de la propriété mobilière d'un neutre pour la guerre. Que s'il le fait, cela ne peut être pardonné que comme *délit*, non pas disculpé et moins encore justifié. D'ailleurs les neutres n'étant pas plus obligés de se prêter aux buts des belligérants que ceux-ci aux buts de ceux-là, rompraient, en le faisant, leur neutralité à l'égard de la partie adverse dans la guerre.

Devant l'abolition déjà faite de l'angarie, il n'y aurait pas même lieu de prodiguer des arguments contre un usage aussi suranné, ce fut-ce le déplorable fait d'essais récents pour le réintégrer qui ont éveillé l'attention du monde. Dans la guerre de 1870-1871, l'un des belligérants viola deux fois, à l'époque du nouvel an, la propriété neutre sur le théâtre de la guerre, en prétendant que l'angarie était encore valide. Une fois, c'était du matériel de chemin de fer, appartenant à une compagnie suisse, qui en Alsace fut saisi avec des marchandises par les autorités allemandes et retenu quelque temps dans des buts de guerre. L'autre exemple, très connu sous le nom de l'affaire *Duclair*", est plus grave. Le commandant d'un corps d'armée prussien cantonné à Rouen s'empara par violence dans la contrée, pres de Duclair, de six navires anglais chargés de charbon et s'en servit comme matériaux de barrage contre l'ennemi. Lorsque le capitaine, conformément à son devoir, se refusa à livrer dans les mains du belligérant contre paiement les navires pour les ordres et l'état intact desquels il portait la responsabilité, on les coula, les équipages se trouvant à bord. Aux plaintes portés par le cabinet de Londres, celui de Berlin répondit en s'en rapportant à "la nécessité de la guerre", tout comme jadis dans des cas pareils. Le ministre prussien prétendit que le fait, bien qu'étant de nature exceptionnelle, n'impliquait aucune transgression des usages de la guerre reçus, et que la question tout entière se réduisait à celle de l'indemnité, cela, parce que le cas était celui d'un danger imminent qui ne pouvait être détourné autrement et qui même en temps de paix eût rendu licite la saisie ou la destruction de propriété étrangère à la seule condition de dédommagement.¹

Ce qui a été dit plus haut tant sur la possibilité de réparer matériellement des actes semblables, que surtout sur leur caractère licite, suffit pour démontrer que ces raisons manquent de tout fondement en droit. D'ailleurs, s'il faut ranger dans la catégorie des "dangers imminents," propres à excuser l'angarie à titre de légitime défense, des faits tels que celui de saisir des navires étrangers pour obstruer un passage à l'ennemi et lui barrer le chemin, presque toute propriété neutre sur le théâtre des hostilités serait à la disposition des belligérants. Toutes les opérations de guerre, à peu près, menacent d'une

¹ Une note adressé en cette occasion par le ministre des affaires étrangères de Prussie à l'ambassadeur à Londres en date du 25 janvier 1871, essaye de légitimer l'angarie en se fondant sur la *définition* qu'en avait donnée Phillimore (*Rev. de dr. int.*, t. III, p. 370). C'est là une manière assez étrange de justifier une chose. Nous avons nous-même défini ci-dessus toutes les violations du droit de protection neutre désapprouvées par nous. Une définition ne donne que la notion, elle n'implique aucun jugement sur la légalité de l'acte. Au contraire, là où Phillimore porte son jugement, il désapprouve l'angarie; c'est ce qui ressort clairement de ses termes cités ci-dessus, et c'est ce que reconnaît aussi avec nous un membre distingué du ministère des affaires étrangères de Prusse de l'époque même de la note précitée: Gessner (v. l. c.).

manière ou d'une autre la vie de soldats de la partie adverse et pourraient à ce titre être censées justifier des mesures de légitime défense. Impossible d'appliquer à la guerre et en y engageant la propriété neutre, les lois de légitime défense appartenant à l'état de paix.

Il faut donc, à cause de principe, qui eût beaucoup gagné à une confirmation expresse dans une occasion aussi importante, regretter non seulement que le gouvernement britannique d'alors se soit contenté du seul dédommagement pécuniaire, en laissant la violation être censée réparée par la somme d'argent allouée aux propriétaires lésés, mais encore qu'il ait accepté passivement les faux considérants allégués à l'appui d'un système depuis longtemps regardé comme à jamais exclu de toute guerre civilisés. D'autre part, on commettrait certainement une erreur en conférant quelque qualité de précédent en droit des gens, à la confirmation officielle par trop complaisante donnée aux attentats commis dans la guerre de 1870-1871 contre la propriété neutre, alors que les belligérants des deux côtés se sont tant départis de leurs meilleures traditions. De même que ni l'essai alors du gouvernement français d'empêcher contrairement à ses principes d'humanité le libre passage pour les transports de malades et de blessés par territoire neutre (v. t. I, p. 506, n. 1) n'a pu créer une interdiction du droit international contre ces passages, ni l'essai du prince Bismarck à la même époque de déclarer la houille contrebande de guerre contrairement à la législation prussienne (v. *ib.*, p. 421) n'a pas pu faire de cet article un objet de contrebande selon le droit international, de même, son essai de ressusciter l'ancienne angarie contrairement à la doctrine allemande ne saurait préparer à cet usage barbare une rentrée dans le dit droit. C'est qu'il ne suffit pas, pour qu'un décret ministériel ou une note diplomatique acquièrent force de précédent, que l'homme d'État dont émane l'acte en *fasse valoir l'application* cette fois-là: il faut aussi des motifs à l'appui qui soient basés sur un fondement plus sérieux que les visées accidentelles du moment dans une politique tout empirique.

LAWRENCE.

[The Principles of International Law, fourth edition, London, 1910, pp. 626-8.]

THE DUTIES OF BELLIGERENT STATES TOWARDS NEUTRAL STATES.

* * * * *

It is sometimes held that states engaged in hostilities possess a right to make use of and even destroy vessels and other property belonging to neutral individuals and found within the limits of belligerent authority, if the exigencies of warfare render such use or destruction a matter of great and pressing importance. This real or supposed right is called *droit d'angarie* or *jus angariae*, which has been anglicized into angary. Now that the Hague Conference of 1907 has decided that payment must be made even for requisitions levied on subjects of the hostile state,¹ it can hardly be contended that neutral property permanently situated in a belligerent country can be seized without compensation, if only it is urgently required for war-like purposes. The claim refers to such property when temporarily within the belligerent's control, the usual case being that of neutral merchantmen found in a belligerent's own ports or ports under his military occupation. The seizure of such vessels and their use for purposes of transport was not uncommon in the seventeenth century or altogether unknown in the eighteenth. Some authorities regard it as possible even to-day.² But the whole trend of recent international action shows that it is obsolete in its most vexatious form of a wholesale embargo on neutral shipping. No recent case of such a high-handed proceeding is to be found. Treaty after treaty forbids it. The assertion of the so-called right is always coupled with an admission that compensation must be made for its exercise. We may imagine how fiercely it might be resented, if we contemplate for a moment what would be the consequences of, say, the seizure by the United States Government of all the liners in the port of New York in order to carry to its destination an expedition against a Central American Republic hastily planned in a sudden emergency. Half the civilized world would suffer, and the other half would make common cause with it. Even the milder manifestations of the power to seize are looked on askance, and provoke so much controversy that belligerent states will be unwilling to resort to them in future. The last instance bears out this view. In 1870 the Germans sank six English colliers in the Seine at Duclair to stop the advance up the river of some French gunboats. Compensation was demanded, and after some hesitation given; and the act was excused on the ground that the danger was pressing and could not be met in any other way.³

¹ Règlement with regard to Land Warfare, Article 52.

² Perels, *Seerecht*, § 40; *U. S. Naval War Code*, Article 6.

³ *Annual Register*, 1870, p. 110.

A provision made by the Second Hague Conference with regard to neutral railway material found by an invader in occupied territory points in the same direction. It is not to be "requisitioned or utilized by a belligerent except in the case of, and to the extent required by, absolute necessity." When seized it is to be put back as soon as possible, and meanwhile the neutral has the right of making a corresponding seizure of rolling stock coming from the territory of the belligerent. Moreover, compensation is to be paid on both sides.¹ If in land warfare, when it has hitherto been the custom to lay hands on all the transport within reach without drawing nice distinctions as to its ownership, the practice is now surrounded with the closest restrictions, there is little to be said for it in maritime struggles, where the difference between neutral and belligerent property has always been sharply accentuated. Moreover, it is difficult to see why vessels alone should be taken. Why not specie also, or cargoes of arms and ammunition, or indeed anything the belligerent is in need of for warlike purposes? The practice, if good at all, is good for whatever an army or navy may require. But in truth it is so indefensible that it is now scarcely defended. Belligerents must make war with their own resources and what they can capture from the enemy, not with neutral property which is unfortunate enough to be for the moment in their power. Extreme need may excuse small seizures, just as it excuses small violations of neutral territory; but the act is nevertheless an offense, and as such requires atonement—great or slight according to the circumstances of the case. In the vigorous words of Dana,² angary "is not a right at all, but an act resorted to from necessity, for which apology and compensation must be made at the peril of war."

¹ *Fifth Convention of the Hague Conference of 1907*, Article 19.

² Note 152 to Wheaton's *International Law*.

DE LOUTER.

[Het stellig Volkenrecht, The Hague, 1910, vol. 2, pp. 164, 412.]

[P. 164, sec. 41—Dwangmiddelen is divided into (a) retorsion, (b) reprisals, (c) embargo, and at the close of the last paragraph, p. 174, he states:]

Whenever such seizure is applied to one's own ships, either for the purpose of search, or as a measure of precaution and sanitation, the act does not come within the field of international law, but within that of political law, and by only a few it is called *civil embargo*. Nor can other coercive measures, called *arrêt de prince* and *droit d'angarie* which fall within the rules of warfare, and representing other forms of seizure of ships, be identified with embargo as a principle of international law.

[Treating of the right of seizing neutral goods anent which he takes the prevailing view, he adds:]

P. 412: A disputable exception, one, moreover, of subordinate importance, is the so-called *droit d'angarie* which, since Louis XIV, has been accepted especially by France, consisting in the right (authority), owing to war necessity, to seize neutral property, especially ships, for the purpose of using them as means of transport or even for other war ends. This authority, upheld by some, as for instance by Azuni and Phillimore, under certain guaranties, is denied by many others, as for instance, by Hautefeuille. It again attracted attention when in December 1870 the Germans, at Duclair, scuttled some English coal barges at the mouth of the Seine, to prevent access to the river to French gunboats. Upon the protest of Great Britain, Count v. Bismarck replied by apologizing and with an offer of full indemnification. It cannot be said that such a right exists; absolute necessity does not legalize an act; but it does, nevertheless, excuse unlawful acts.

OPPENHEIM.

[International Law, second edition, London, 1912, vol. 2, p. 446.]

IX. RIGHT OF ANGARY.

§ 364. Under the term *jus angariae*¹ many writers on International Law place the right, often claimed and practiced in former times, of a belligerent deficient in vessels to lay an *embargo* on and seize neutral merchantmen in his harbours, and to compel them and their crews to transport troops, ammunition, and provisions to certain places on payment of freight in advance.² This practice arose in the Middle Ages,³ and was made much use of by Louis XIV of France. To save the vessels of their subjects from seizure under the right of angary, States began in the seventeenth century to conclude treaties by which they renounced such right with regard to each other's vessels. Thereby the right came into disuse during the eighteenth century. Many writers⁴ assert, nevertheless, that it is not obsolete, and might be exercised even to-day. But I doubt whether the Powers would concede to one another the exercise of such a right. The facts that no case happened in the nineteenth century and that International Law with regard to rights and duties of neutrals has become much more developed during the eighteenth and nineteenth centuries, would seem to justify the opinion that such angary is now probably obsolete,⁵ although some writers⁶ deny this.

§ 365. In contradistinction to this probably obsolete right to compel neutral ships and their crews to render certain services, the modern right of angary consists in the right of belligerents to make use of, or destroy in case of necessity, *for the purpose of offence and defence*, neutral property on their own or on enemy territory or on the Open Sea. In case property of subjects of neutral States is vested with enemy character,⁷ it is not neutral property in the strict sense of the term neutral, and all rules respecting appropriation, utilisation, and destruction of enemy property obviously apply to it. The object of the right of angary is *such property of subjects of neutral States as retains its neutral character from its temporary position on belligerent territory and which therefore is not vested with enemy character*. All sorts of neutral property, whether it consists of vessels or other⁸ means of transport, or arms, ammunition, provisions, or other personal property, may be the object of the right

¹ The term *angaria*, which in medieval Latin means *post-station*, is a derivation from the Greek term *ἀγγαρος* for messenger. *Jus angariae* would therefore literally mean a right of transport.

² See sec. 40.

³ On the origin and development of the *jus angariae*, see Albrecht, *Requisitionen*, pp. 24-37.

⁴ See, for instance, Phillimore, III, sec. 29; Calvo, III, sec. 1277; Heffer, sec. 150; Perels, sec. 40.

⁵ See Article 39 of the "Règlement sur le régime légal des navires *** dans les ports étrangers" adopted by the Institute of International Law (Annuaire, XVII. 1898, p. 272): "Le droit d'angarie est supprimé, soit en temps de paix, soit en temps de guerre, quant à ux navires neutres."

⁶ See Albrecht, *op. cit.*, pp. 34-37.

⁷ See sec. 90.

⁸ Thus in 1870, during the Franco-German War, the Germans seized hundreds of Swiss and Austrian railway carriages in France and made use of them for military purposes.

of angary, provided the articles concerned are serviceable to military ends and wants. The conditions under which the right may be exercised are the same as those under which private enemy property may be utilized or destroyed, but in every case the neutral owner must be fully indemnified.¹

A remarkable case² happened in 1871 during the Franco-German War. The Germans seized some British coal-vessels lying in the river Seine at Duclair, and sank them for the purpose of preventing French gunboats from running up the river. On the intervention of the British Government, Count Bismarck refused to recognize the duty of Germany to indemnify the owners of the vessels sunk, although he agreed to pay indemnities.

However, it may safely be maintained that a duty to pay indemnities for any damage done by exercising the right of angary must nowadays be recognized. Article 53 of the Hague Regulations stipulates the payment of indemnities for the seizure and utilitisation of all appliances adapted to the transport of persons or goods which are the private property of inhabitants of occupied enemy territory, and article 52 of the Hague Regulations stipulates payment for requisitions; if, thus, the immunity from confiscation of private property of inhabitants is recognized, all the more must that of private neutral property temporarily on occupied enemy territory be recognized also.

§ 366. A special case of the right of angary has found recognition by article 19 of Convention V. of the Second Peace Conference enacting that railway material coming from the territory of a neutral Power, whether belonging to the neutral State or to companies or private persons, shall not be requisitioned or utilised by a belligerent, *except in the case of and to the extent required by absolute necessity*, that it shall as soon as possible be sent back to the country of origin, and that compensation shall be paid for its use.³ But it must be mentioned that article 19 gives a right to a neutral Power, whose railway material has been requisitioned by a belligerent, to retain and make use of, to a corresponding extent, railway material coming from the territory of the belligerent concerned.

§ 367. Whatever the extent of the right of angary may be, it does not derive from the law of neutrality. The correlative duty of a belligerent to indemnify the neutral owner of property appropriated or destroyed by the exercise of the right of angary does indeed derive from the law of neutrality. But the right of angary itself is rather a right deriving from the law of war. As a rule this law gives, under certain circumstances and conditions, the right to a belligerent to seize, make use of, or destroy private property of inhabitants only of occupied enemy territory, but under other circumstances and conditions, and very exceptionally, it likewise gives a belligerent the right to seize, use, or destroy such neutral property as is temporarily on occupied enemy territory.

¹ See article 6 of U. S. Naval War Code:—"If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed, or otherwise used for military purposes, but in such cases the owners of the neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed upon in advance with the owner or master of the vessel; due regard must be had for treaty stipulations upon these matters." See also Holland, *War*, No. 140.

² See Albrecht, *op. cit.*, pp. 45-48.

³ See Nowacki, *Die Eisenbahnen im Kriege* (1906), pp. 115-126, and Albrecht, *op. cit.*, pp. 22-24.

PERELS.

[Das internationale öffentliche Seerecht der Gegenwart, second edition, Berlin, 1903; pp. 221-222.]

III. ANGARIAE

The right of war does not only admit of the detention of neutral merchant ships, but even of the authority of the belligerents to use them in their ports for transportation service, and to use the crews of such vessels to perform services.¹ These services are called *angariae*, and the right to requisition them is called *jus angariae*.²

The right of *angary* has, in numerous treaties of commerce and navigation, found express or implicit recognition, even in the most recent times. The fact that this right is contested on the part of a few publicists can not be upheld.³

The commanders of the English Navy are, it is true, directed to object to such requisition of British merchant ships and to endeavor to secure their release.⁴

Whenever the captain of a merchant ship has been subjected to the law of *angary*, the ship owner is entitled to a claim for *indemnification*. According to the more recent treaties of commerce and navigation⁵ such a requisition for military purposes or other public service, in so far as it is not absolutely excluded, may be effected only after a previous determination of a proper indemnification.

¹ v. Liszt (section 24, p. 183) derives the right of *angariae*—and also the right of the detention of neutral merchant ships without the requisition for services—from the idea of necessity; Rivier argues to the same effect (*Principes*, II, p. 328).

² This conception recurs frequently in the Roman sources, and is related to ἀγγαρος (messenger, from the Persian) and denotes in its wider sense compulsory services for public purposes. See, F. F. Karseboom, *Specimen juris gentium et publici de navium detentione, quae vulgo dicitur embargo*, Amstel. 1840, p. 34 bis 44.

³ Especially, v. König (*Handbuch des deutschen Konsularwesens*, 6th ed. Berlin, 1902, p. 130, note.); Kleen (in the *Rev. de dr. i.*, volume 25 [1893], p. 282); Rosse, (*Eléments*, p. 53).—De Boeck (Section 737) criticises the right of *angary*, with reference to neutral ships as “odieux et vexatoire.”

⁴ Q. R. Art. 456: “In the case of any British merchant ship whose nationality is unquestioned being coerced into the conveyance of troops or into taking part in other hostile acts, the Senior Naval Officer, should there be no Diplomatic or Consular Authority on the spot, will remonstrate with the local authorities and take such other steps to assure her release or exemption as the case may demand, and as may be in accordance with the Regulations.”

⁵ Of the older treaties, see the treaty between Prussia and the United States of North America, of July 11, 1799 (Art. 16), in conjunction with the treaty of May 1, 1828 (Art. 12). Of the more recent treaties of commerce and navigation concluded by Germany, the following deal with the matter: with Salvador of June 13, 1870 (Art. 6) [not in force]; with Portugal of March 2, 1872 (Art. 2); with Costa Rica of May 18, 1875 (Art. 7); with the Kingdom of the Hawaiian Islands of March 25-September 19, 1879 (Art. 72); with Mexico of December 5, 1882 (Art. 14); with Spain of July 12, 1883 (Art. 6); with Dominican Republic of January 30, 1885 (Art. 8); with Guatemala of September 20, 1887 (Art. 7) [denounced]; with Honduras of December 12, 1887 (Art. 7); with Colombia of July 23, 1892 (Art. 7); with Nicaragua of February 4, 1896 (Art. 7).

PERELS.

[Manuel de droit maritime international, Arendt edition, 1884, p. 254.]

SECTION 41. EMPLOI DE NAVIRES DE COMMERCE NEUTRES À DES USAGES DE GUERRE

I. Nous avons exposé plus haut (§ 31, V) pourquoi l'on doit considérer comme légitime l'embargo mis dans l'intérêt des opérations militaires sur les navires de commerce neutre qui se trouvent dans les ports du belligérant. Mais ce n'est pas seulement le simple arrêt, exécuté par la force en cas de résistance, qui est permis; les usages de la guerre autorisent aussi l'emploi du navire neutre à des services de transport et autres du même genre, auxquels l'équipage neutre peut lui-même être forcé de concourir. C'est le droit d'*angarie*; il peut toutefois être interdit par traités. Le devoir du capitaine d'un navire de commerce est de se rendre à une réquisition de cette espèce, sauf aux armateurs à recourir en dommages-intérêts pour être indemnisés du tort que ces mesures leur ont causé. De nombreux traités contiennent des stipulations expresses à cet égard.¹ D'après la pratique récente, une semblable saisie, destinée à pourvoir à des entreprises militaires ou à d'autres services publics, ne peut se produire que contre indemnité à fixer préalablement; souvent aussi on a interdit par traité toute réquisition adressée aux sujets de l'autre partie contractante pour les contraindre à participer à des opérations militaires, et l'on a reconnu implicitement par là que les équipages de leurs navires ne pouvaient être forcés à rendre des services de cette nature.

II. Il faut même regarder comme permise la destruction de navires neutres qui se trouvent dans les eaux de l'ennemi, pour cause de nécessité militaire et contre pleine indemnité.² La saisie de bâtiments anglais qui furent coulés à fond dans la Seine, à Duclair, par les troupes prussiennes en décembre 1870, provoqua un long échange de notes entre les cabinets de Londres et de Berlin. L'Allemagne paya l'indemnité, mais en maintenant le principe que dans des cas semblables cette obligation incombait au vaincu et non au vainqueur.³

¹ Parmi les anciens traités, voir ceux entre la Prusse et les Etats-Unis d'Amérique des 10 septembre 1785 et 11 juillet 1799 (art. 16); parmi les récents, celui de l'Allemagne avec l'Espagne, du 30 mars 1863 (art. 5), avec le Mexique, du 28 août 1869 (art. 13), avec le Salvador, du 13 juin 1870 (art. 6), avec le Portugal, du 2 mars 1872 (art. 2), avec le royaume des îles Hawiennes, du 25 mars/19 septembre 1879 (art. 2).

² Bluntschli, art. 795 a.

³ Voir sur cet incident, Dahn, dans les *Annales de l'armée et de la marine allemandes*, t. V, p. 138 et suiv., et l'échange de dépêches officielles dans le *Staatsarchiv*, t. XX, n° 4498, à 4509. et dans Hirth's *Tagebuch*, nos 1229, 1254, 1309, 1330, 1339, 1405.

PHILLIMORE.

[Commentaries upon International Law, third edition, London, 1879-85, vol. 3, pp. 46, 49.]

The distinction between the Civil and the Belligerent (so to speak) Embargo, is explained in a judgment given by Lord Stowell, in the matter of the Dutch ships detained in port, at the *Cape of Good Hope*, before declaration of hostilities against Holland, claimed as *droits* of Admiralty, condemned to the Crown *jure coronae*.

"On the breaking out, I cannot say of war, but of that ambiguous situation into which the irregular conduct of France had put different countries, but dissolving the connection between the governors and the governed, it was found necessary, when Holland became exposed to the invasion of the French arms, to detain by the strong hand of power, a number of Dutch ships in the ports of this kingdom. At the same time, conciliating language was used to the proprietors, and promises were held out to all such as should voluntarily come in, that their property should be restored to them. It is notorious also, that on the declaration of hostilities that ensued, these seizures were enforced, with a retrospective operation, on all who had not complied with the terms; and were not considered as mere Civil Embargoes, but as acts of forcible possession, on which the property so seized was finally condemned as prize to the Crown. Now, unless very strong and solid distinctions can be pointed out between this case and those which have pursued this course, I see no reason why this should not journey in the same track. Two or three distinctions have been taken. In the first place, it is said, that the detention in the ports of England was a mere Civil Embargo, and that an Embargo of that nature could not extend to foreign ports, where the Crown of England has no jurisdiction. In the first place, it is not necessary that the Embargo should be exactly of the same nature, in order to vest the Rights of the Crown: for any mode of forcible occupancy or detainer prior to hostilities is sufficient for the purpose; and, secondly, the nature of the Embargo in the ports of this kingdom is not very accurately described, when it is termed a mere Civil Embargo; for it was a detention by actual force applied to them. The ships were generally taken possession of by an armed power; it was not the mere hand of the Custom House that was laid upon them, in the civil mode of forbidding an egress, but it was a restraint and compulsion, acting by the terror and use of force. The Embargo at the *Cape* was likewise an Embargo of force; and the very argument that it could not be a Civil Embargo, because this Government had no right to lay on a Civil Embargo in a foreign port, proves that it was an Embargo of force; though, if it was at all necessary that it should partake of anything like a civil authority, it must be remembered that the Stadtholder's name and authority is likewise employed; but it is notorious, that some ships of war that attempted forcibly to escape were forcibly detained: that is enough to show its nature, if it were at all necessary."¹

[Page 49.] There is yet another measure, partaking also of a belligerent character, though exercised, strictly speaking, in time of peace, called by the French *le droit d'Angarie*.² It is an act of the State, by which foreign as well as private domestic vessels which happen to be within the jurisdiction of the State, are seized upon, and compelled to transport soldiers, ammunition, or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a Power with whom they are at peace. The owners of these vessels receive payment of freight beforehand. Such a measure is not without the sanction of practice and usage, and the approbation of many good writers upon Inter-

¹ *The Gertruyda*, 2 C. Rob. Adm. Rep. 219-21.

² *Vide post* Count Bismarck's reference to the passage.

national Law;¹ but if the reason of the thing and the paramount principle of national independence be duly considered, it can only be excused, and perhaps scarcely then justified, by that clear and overwhelming necessity which would compel an individual to seize his neighbour's horse or weapon to defend his own life. At all events, justice demands that the owners of such goods and vessels be indemnified for all damages caused by the interruption of their lawful gains, and for the possible destruction of the things themselves, though so high an authority as M. Massé² says that usage has not hitherto gone that length.

The doctrine here laid down was admitted and acted upon by Prussia when, in the last war with France, she sank certain British vessels in the mouth of the Seine.

* * * * *

A proper indemnification was subsequently made.

It is worse than idle to speak or write in a depreciating tone, as some modern writers do, of the value and influence of *usage*³ in all international affairs. Not only is it a law to which both contending parties may be held to have assented,⁴ but its notoriety operates as a notice and warning to foreigners that in certain contingencies certain consequences will follow within a certain jurisdiction. It is optional with them to place themselves or not within that jurisdiction; but when the contingency does arise, and the consequence does follow, *ignorantia juris*⁴ is morally and legally a bad plea,—an argument which, in truth, answers much shallow declamation upon this and similar subjects.

XXX. We have been considering this *droit d'Angarie* solely with respect to *neutrals*. So far as subjects are concerned, it is a question of Public, and not International Law; so far as *allies* are concerned, they cannot reasonably complain if they meet with the same treatment as subjects.

XXXI. It may perhaps be thought that these remarks have trespassed upon that part of this work which treats of open war, but it does not necessarily follow that war ensues upon the first exercise of this right, and the *droit d'Angarie* is always classed with Reprisals and Embargo by writers upon International Law.

¹ “* * * *Angarium* onus etiam exteros afficit, quod quotidiana confirmat praxis.”—Vinnius ad Peckium, *De Navib. non e. cus.* Stypmannus, *Ad Jus Milit. Anseat.* Pt. v. c. i. n. 23. Loccenius, *De Jure Milit.* l. i. c. v. s. 3. Azuni, *Droit Maritime de l'Europe*, t. i. c. iii, art. 5. Massé, *Droit Commercial*, t. i. l. ii. tit. i. c. 2. s. 7. sect. 5 s'exprime en ces termes: “Les belligérants, tout en respectant d'ailleurs la neutralité, la soumettent quelquefois à certaines exigences qui, sans lui porter atteinte, entravent momentanément la liberté des neutres. C'est ce qui a lieu lorsqu'un État belligérant met en réquisition les bâtiments neutres qui se trouvent dans les ports et rades de sa domination et les oblige à transporter, moyennant salaire, des armes, des troupes, des munitions: on donne à cette réquisition le nom d'angarie.”

These authorities are cited by M. Hauteville.

² “Observons, au surplus, que les prestations imposées aux navires atteints par l'angarie ne sont pas gratuites, et que les armateurs doivent recevoir la valeur du service forcé qu'ils ont rendu * * * Il serait juste aussi, dit-il, de les indemniser en outre de la domination qu'ils ont pu souffrir par suite de l'interruption de leur voyage, ou de leurs expéditions; mais l'usage ne paraît pas aller jusque là.”—Massé, t. i. l. ii, tit. i. c. ii. s. 2. sec. 5. n. 324.

³ *Vide ante*, vol. i. pt. i. c. v. “*Probatur autem hoc jus gentium*” (here used for *jus inter gentes*) “*ferè modo quo jus non scriptum civile, usu continuo, et testimonio peritorum. Est enim hoc jus, ut rectè notat Dio Chrysostomus, εὔρημα βίου καὶ χρόνου, repertum temporis et usus, atque in eam rem maximum populi usum præbent illustres annalium conditores.*”—*Grot.* l. i. c. i. xiv. 2.

⁴ *Vide post.*

SPAIGHT.

[War Rights on Land, London, 1911, p. 510.]

The property of neutral individuals which is permanently situated in an invaded territory is subject to all the risks of war. The belligerent has an unquestioned war right to seize, use, or destroy such property if military necessity demands. His further right to seize or destroy neutral property which is only passingly within his territory or that occupied by him has now received international recognition, so far as railway material is concerned, in Article XIX of The Hague Convention. Such a right—called by jurists the right of Angary of Prestation—has always been admitted by usage.

This right appears (says Cobbett) to be no more than a particular application of the general right which a State has to appropriate all property, foreign or domestic, found within the limits of its jurisdiction or occupation, for purposes dictated by public necessity. To attempt to deny or suppress the exercise of the right in such cases would be futile. One can only say that so far as neutral property is concerned, its exercise ought to be founded on great military necessity and that a proper indemnity ought to be paid.¹

Two instances of the application of the *droit d'angarie* occurred in the Franco-German War. The Germans seized 600 or 700 carriages belonging to the Swiss Central Railway and kept them for a considerable time.² The other case was an even more remarkable one. Seven English colliers had come up the Seine to Rouen under a German permit and, having discharged their cargoes, were taking in ballast preparatory to returning, when they were severally boarded by parties of German officers and men, who informed the captain in each case that his ship was required by the German military authorities. The captains protested and pointed to the flag of England at their mastheads; but the officers, sure of their war law, were not at all impressed by that symbol, and merely repeated that they had instructions to requisition the ships and sink them in the river; the object being to close the channel against the French gun-boats which made excursions up the river from Havre and Quilleboeuf. Some of the ships are stated to have been scuttled before the crew had had time to remove their effects; indeed in one case the German soldiers went down into the hold with augers to scuttle the ship before anything had been said to the master. In no case did the captain haul down his flag; this was done by the Germans in some cases, while in others the ships were sunk with their colours flying. The flag of the *Sylph* is said to have been trampled upon and used as a boot-wiper by the party which boarded that ship. The crews reached Newhaven in a state of destitution and the tale they told—perhaps a little garnished, as mariners' tales are wont to be—very nearly set England in a blaze. The sensation caused by the incident was hardly less acute and deep than that which followed the sinking of the English fishing-smacks on the Dogger by Rojestvensky's fleet in 1904. The matter was taken up by the British Government,

¹ Sir W. Pitt Cobbett, *Leading Cases and Opinions on International Law*, p. 349.

² Cobbett, *loc. cit.*; Hall, *International Law*, p. 744.

who called upon Germany for an explanation. Bismarck at once expressed the regret of his Government, admitted the claim of the owners and crews to indemnification, and promised that, if it were proved "that excesses had been committed which were not justified by the necessity of defence," the guilty persons would be called to account. But at the same time he contended: "That the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usages. A pressing danger was at hand, and every other means of averting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible, under reservation of indemnification."

Great Britain did not demur to this statement of the International Law bearing upon the case and the incident was closed by an amicable settlement.¹ Even in the immediate heat of the controversy all the enlightened opinion of England recognized that the Germans had not overstepped their war rights in doing what they did. It was only the extreme pro-Gallicists who cried out for "an hour of Chatham, Nelson, or Cromwell" and demanded a holocaust of Prussian ships to avenge the insult to the British flag. Given a vital and pressing necessity, an emergency "which would compel an individual to seize his neighbour's horse or weapon to defend his own life,"² a commander is fully entitled to resort to any seizure or destruction of any property whatsoever which is essential to his self-preservation. The verdict of the German Manual on the Duclair incident—it was at Duclair that the colliers were actually sunk—is a temperate and sound one. The act, it says: "Was certainly justified by the necessities of war, but it amounted to a violent outrage upon English property and for this the British Government claimed an indemnity, which was willingly granted by Germany."³

But the right to seize or destroy neutral property which is not, as it were, *domiciled* in the enemy's country, but which has been brought there in the course of that international commerce which it is the general interest of nations to protect in war as in peace, is a right which requires to be jealously watched and restricted.

The new provision (added in 1907) of Article XIX which allows a neutral State to keep and use the railway material of a belligerent who has seized its stock has a double object: first, to prevent a neutral State having its own railway service disorganized by the loss of its rolling stock; secondly to provide an automatic discouragement, as it were, to the practice of seizing neutral material which a belligerent might be inclined to resort to if the material so obtained became a clear addition to his resources. The set-off provided by the article constitutes a valuable restraint upon unscrupulous belligerents. The seizure by the neutral is not a measure of reprisals; and it must be resorted to impartially and not in such a way as to favour a particular belligerent.

¹ See a very full account of the incident in Cassell's *History*, Vol. II, pp. 88, 567-8; see also Hall, *International Law*, pp. 744-5; Boyd's Wheaton's *International Law*, p. 353. The indemnity paid by Germany included (1) the value of the ships and 25% in addition; (2) the highest value of the cargoes at the time of capture and at the place of shipment, less port dues and charges for unloading, which had not been paid; (3) small sums incurred for protests and counter certificates; (4) 5% interest on the sums so ascertained. The masters and seamen also put forward a claim for loss of employment and effects, but the British Government refused to prefer a claim on Germany under this head. The cost of sending the men home was also allowed by Germany (Cobbett, *op. cit.*, p. 348).

² Sir R. Phillimore, quoted Lawrence, *International Law*, p. 518.

³ *Kriegsbrauch im Landkriege*, p. 75.

TAYLOR.

[A Treatise on International Public Law, Chicago, 1901, p. 701.]

§ 641. BELLIGERENT RIGHT OF ANGARY.—From what has been said heretofore, it appears that the persons and property of neutral individuals residing in a belligerent state are, during the progress of hostilities, subject to all such exceptional measures as the exigencies of war render necessary, provided that no unjust discrimination is made in their application between subjects and foreigners.¹ As resident neutrals are thus assimilated with the mass of the population of the state in which they live, so far as its government is concerned, it is not entirely unreasonable that, to a certain extent at least, they should be dealt with in the same general way by an occupying belligerent. And yet as such neutrals are subjects of a friendly state and cannot be presumed to be personally hostile to such belligerent until the contrary appears, there are cogent reasons why neutral property, accidentally or temporarily within belligerent territory, should be exempted from the indisputable general principle that neutral property, associated either permanently or for a considerable time with such territory, must suffer all the vicissitudes to which the property of subjects is liable.

As a recognition of the fact that neutral property, accidentally or temporarily within the theater of war, is entitled to special consideration, occupying belligerents have recognized the duty of making just compensation for its appropriation. The right of a belligerent to use such property or even to destroy it when necessary, subject to liability for just compensation, is called *le droit d'angarie* or *angaria*, a term which has been anglicized into angary. Phillimore says, "It is an act of the state, by which foreign as well as private domestic vessels which happen to be within the jurisdiction of the state, are seized upon, and compelled to transport soldiers, ammunition or other instruments of war; in other words, to become parties against their will to carrying on direct hostilities against a power with whom they are at peace. The owners of these vessels receive payment of freight beforehand. Such a measure is not without the sanction of practice and usage, and the approbation of many good writers upon international law. * * * At all events, justice demands that the owners of such goods and vessels be indemnified for all damages caused by the interruption of their lawful gains, and for the possible destruction of the things themselves, though so high an authority as M. Massé says that usage has not hitherto gone that length."² It appears that a considerable portion of the French expedition to Egypt in 1798 was carried in neutral vessels seized in the ports of France.³ Less than ten years before Martens had said in his *Précis* (§ 269) that "it is doubtful whether the common law of nations gives to a belligerent, except in cases of extreme necessity, the right of seizing neutral vessels lying in his ports at the outbreak of war, in order to meet the requirements of his fleet, on payment of their services. Usage has introduced the exercise of this right, but a number of treaties have abolished it." About the same time, however, Azuni, treating the right as existing in all cases

¹ See p. 554.

² Int. Law, III, § xxix.

³ Martens (R.), VII, 163.

of "necessity of public utility," declared that any vessel attempting to avoid it is liable to confiscation.¹ At a later date both Heffter (§ 150) and Bluntschli (§ 795) have recognized the existence of the right, with more or less reserve; and Dana,—after reviewing the leading authorities and certain provisions upon the subject contained in treaties between the United States, Prussia and Venezuela,—concludes that "these treaties certainly seem to recognize this *angaria* as a right, or at least as a practice of nations, and only seek to regulate its exercise."² Halleck says: "By virtue of this right, neutral vessels may be appropriated by a belligerent, on payment of a reasonable price for compensation. It is akin to the right of prestation by which neutral vessels may be hired by a belligerent, on payment of freight beforehand, and to embargo or arrest of princes."³

RIGHT OF ANGARY AS EXERCISED DURING THE FRANCO-PRUSSIAN WAR OF 1870-1871

The most recent examples of the exercise of the right of angary occurred during the Franco-Prussian War, when it was invoked as a justification for the appropriation of personal property belonging to Swiss, Austrian and British subjects. Between six and seven hundred railway carriages belonging to the Central Swiss Railway, in addition to a considerable quantity of Austrian rolling stock, were seized for military purposes by the German authorities of Alsace, who appear to have retained the property so seized for some time. A clearer and more important application of the right grew out of the seizure, almost at the same moment, of six British merchant vessels by the German general commanding at Rouen, who sunk them in the Seine at Duclair to prevent French gunboats from running up the river in order to cut off communication between the German corps operating on both banks. When the German military authorities failed to make agreements with the captains of the vessels to sink them, after the removal of their cargoes and the payment of their value, the refusal of the captains to enter into such an arrangement was "considered to be an infraction of neutrality," which was followed by the sinking of vessels by firing upon them while some members of their crews appear to have been still on board. Count Bismarck, in defending this proceeding, maintained that "the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usage," because he said that "the report shows that a pressing danger was at hand, and every other means of meeting it was wanting; the case was, therefore, one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification."⁴ The British Government evidently accepted that statement as a correct exposition of the international rule upon the subject, as it only demanded that the persons whose property had been destroyed should receive just compensation.

¹ *Droit Maritime*, Part 1, ch. III, art. 5. In art. VI he says: "The right of stopping or detaining the vessel of a friend is derived from the same source as that of impressing ships. * * * This detention is made upon the payment, to the vessels retained in such circumstances, of a reasonable freight, equal to what they might have otherwise earned." See also Molloy, *De Jure Maritimo*, I, ch. 6; Loccenius, *De Jure Marit.*, I, c. v., § 3; Massé, *Droit Commercial*, I, 1, ii, tit. 1, c. 2, § 7.

² Dana's *Wheaton*, note 152, p. 373.

³ *Int. Law* (Baker ed.), i, p. 485.

⁴ D'Angeberg, Nos. 914, 920, 957; *State Papers*, 1871, lxxi. c. 250; *Ann. Reg.* for 1870, p. 110; Hall, pp. 765-67.

WEHBERG.

{ "Das Seekriegsrecht," in Handbuch des Völkerrechts, vol. 4, Berlin, 1915, p. 70.]

3. ANGARIAN LAW

It may so happen that the owners or other persons entitled to dispose of neutral ships are not ready to sell them to one of the belligerents. Is the belligerent in such case entitled to appropriate them directly? As evidenced by many treaties and by practice, this question is affirmed by some States. This proposition involves the so-called Angarian Law which forms part of the embargo, but is not like the latter confined to mere seizure of property, but purports the seizure of neutral property for the captor's own use.¹ But in a wider interpretation, the Angarian Law covers also the seizure of enemy property, when this seizure is made on another legal basis except the exercise of the prize law. The word "Angaria" did not originally refer merely to the requisition of merchant ships, but to the claim to compulsory services that were exacted in the postal administration and for transportation generally. In the Middle Ages and especially in the time of Louis XIV, by Angarian Law was meant the power and authority to compel neutral ships to service for the fleet. The Angarian Law of to-day rests upon the necessities of war.² For this reason we are not warranted in discussing the restriction of the exercise of this law to the home waters of the belligerents. Rather, in the absence of an international legal prohibition, the Angarian Law applies also to the high seas. When the necessity of war constitutes the basis of this right, can we differentiate between the home waters and the high seas?³ Only such limits may be put to the necessities of war as are expressly recognized. The belligerent has no rights whatever over the crew of the requisitioned ships.

As a rule full indemnification must be made for the seizure of neutral ships, but in the so called Duclair case of 1870 (Sinking of English Ships at the Entrance to the Seine), Germany has, it is true, not recognized the principles of indemnification.⁴ But in view of the fact that neutral ships are not in position, as in the case of blockade and in the conveying of contraband, to escape such seizure, it would seem that indemnification which in other respects is everywhere recognized in theory and in practice, would be proper in the circumstances.⁵

A number of writers, like Kleen⁶ vigorously oppose the Angarian Law. It can not be denied that *de lege ferenda* it could be restricted in its operation. It could at least be framed into a legal principle in virtue of which its exercise might be limited to the home waters of

¹ See Kleen II, p. 69.

² Schramm, p. 274.

³ See Oppenheim II, p. 447; Kraemer, *Die unterseeischen Telegraphenkabel in Kriegszeiten*, 1903, p. 31; A. Albrecht, p. 62; Willms, p. 125; Müller, *Kabel und Seekriegsrecht*, 1911, p. 75.

⁴ See Kleen II, p. 73 onwards.

⁵ Willms, p. 125.

⁶ II, p. 72.

the belligerents. It is likewise to be kept in mind, that the utilization of neutral ships as auxiliary cruisers always entails the danger of destruction, and could be prohibited on exactly the same grounds on which neutral prizes have been prohibited from their being used for war purposes.¹ For this reason it was no doubt that Germany refused to recognize the Angarian Law. In section 9 of the German Prize Laws it states:

Even by payment of an indemnification, the commander is not entitled against the will of the parties interested to requisition ships or goods not subject to seizure or capture.

Of course before the other states will make this stand their own, we can hardly expect that it will be generally followed up.

In its wider application, enemy merchant ships are also subject to the Angarian Law, if they are exempt from the prize law. The "agreement regarding the treatment of enemy merchant ships after hostilities have been begun," provides in its Articles 2, 3 and 4 that ships of this kind may be requisitioned provided compensation is made.

If, on the basis of a provision of the prize law, enemy ships are seized, the capturing state may forthwith convert the prize into a warship even though the prize court decision has not yet been rendered. Compensation is not made in such cases.

¹ But the facts in the two cases just mentioned are not the same, since in accordance with the Angarian Law indemnification must be paid. And the exercise of this law is furthermore made to depend upon the necessities of war.

WESTLAKE.

[International Law, Part II, War, second edition, Cambridge, 1913, p. 134.]

The invader's right as to neutral property is sometimes spoken of as one of *angary*, a name given to the right of a prince to impress neutral ships lying in his ports at the outbreak of war. The conditions of modern naval war are such that that right cannot now be often useful, though it was once of considerable importance, but it seems still to exist in case of real necessity, and its exercise would certainly be subject to the duty of compensation. Any right, however, of a sovereign in his own territory could scarcely be made to apply to the claims of an invader except on the exploded notion of occupation being conquest, and it is therefore better to discuss the claims of an invader on their separate merits.

PART II

OFFICIAL DOCUMENTS BEARING ON THE RIGHT OF ANGARY

PROPOSITION DE LA DÉLÉGATION D'ALLEMAGNE.

PROJET D'UNE NOUVELLE SECTION À AJOUTER AU RÈGLEMENT DE 1864 CONCERNANT LES LOIS ET COUTUMES DE LA GUERRE SUR TERRE.

(Deuxième Conférence Internationale de La Paix. Actes et Documents. La Haye, Imprimerie Nationale, 1907, vol. iii, p. 268.)

SECTION V. DU TRAITEMENT DES PERSONNES NEUTRES DANS LES TERRITOIRES DES PARTIES BELLIGÉRANTES

CHAPITRE I.—*Définition de la personne neutre*

ARTICLE 61.

Seront considérés comme personnes neutres tous les ressortissants d'un Etat qui ne prend pas part à la guerre.

ARTICLE 62.

La violation de la neutralité entraîne la perte de la qualité de personne neutre vis-à-vis de l'une et de l'autre Partie belligérante. Il y a violation de la neutralité

(a) si la personne neutre commet des actes hostiles contre une des Parties belligérantes;

(b) si elle commet des actes qui soient en faveur d'une des Parties belligérantes, notamment si elle prend volontairement du service dans les rangs de la force armée de l'une des Parties [Article 64 alinéa 2].

ARTICLE 63.

Ne seront pas considérés comme actes commis en faveur d'une des Parties belligérantes dans le sens de l'article 62, numéro (b)

(a) les fournitures faites ou les emprunts consentis à une des Parties belligérantes pour autant que ces fournitures ou ces emprunts ne proviennent pas du territoire ennemi ou occupé par l'ennemi;

(b) les services rendus en matière de police ou d'administration civile.

CHAPITRE II.—*Des services rendus par les personnes neutres*

ARTICLE 64.

Les Parties belligérantes ne pourront requérir les personnes neutres de leur rendre des services de guerre, même consentis.

Sont considérés comme services de guerre tous les services rendus par un neutre dans la force armée d'une des Parties belligérantes en qualité de combattant, de conseil et, en tant qu'il est placé sous les lois, règlements et ordres en vigueur pour cette force armée, à d'autres titres encore, par exemple comme secrétaire, homme de métier, cuisinier. Sont exceptés les services rendus à titre ecclésiastique et sanitaire.

ARTICLE 65.

Les Puissances neutres sont tenues d'interdire à leurs ressortissants de s'engager à faire un service de guerre dans la force armée d'une des Parties belligérantes.

ARTICLE 66.

Les personnes neutres ne pourront être non plus requises, contre leur gré, de rendre à la force armée d'une des Parties belligérantes des services non considérés comme services de guerre.

Il sera toutefois permis de les requérir, en dehors du combat, en vue de services sanitaires ou de police sanitaire. Ces services devront, autant que possible, être payés au comptant. Dans le cas de non paiement au comptant, il sera délivré des bons de réquisition.

CHAPITRE III.—*De la propriété des personnes neutres*

ARTICLE 67.

Aucune contribution de guerre ne pourra être levée sur des personnes neutres.

Par contribution de guerre on entend toutes les contributions levées expressément dans un but de guerre.

Ne sont pas considérées comme contributions de guerre les impôts, droits et péages existants ou les contributions spécialement imposés, par une des Parties belligérantes, dans le territoire ennemi occupé par elle, pour les besoins de l'administration de ce territoire.

ARTICLE 68.

Il est interdit de détruire, de détériorer ou d'endommager la propriété neutre à moins que les exigences de la guerre n'en imposent la nécessité. En ce cas, la Partie belligérante n'est tenue à l'indemnisation, dans son propre pays comme dans le pays ennemi, qui si les ressortissants d'une autre pays neutre ou les propres nationaux jouissent également de l'indemnisation et que la réciprocité soit garantie.

ARTICLE 69.

Les Parties belligérantes accorderont pour l'utilisation d'immeubles neutres en pays ennemi la même indemnité que dans leur propre pays, pour autant que la réciprocité est garantie dans l'état neutre. En aucun cas cette indemnité ne pourra toutefois être supérieure à celle prévue en pays ennemi pour le cas de guerre par la législation de ce pays.

ARTICLE 70.

Les Parties belligérantes sont autorisées à exproprier ou à utiliser, contre paiement immédiat et en espèces, dans un but militaire quelconque, tous les biens meubles neutres qui se trouvent dans leur pays.

Elles sont autorisées à agir de même en pays ennemi, dans les limites et aux conditions prévues à l'article 52.

ARTICLE 71.

Les bateaux et leur chargement ne peuvent être expropriés ou employés par une Partie belligérante que si ces bateaux servent à la navigation fluviale dans son territoire ou dans le territoire ennemi.

En cas d'expropriation l'indemnité équivaudra à la valeur intégrale du bateau ou du chargement, majorée de dix pour-cent. En cas d'emploi elle répondra à l'affrètement ordinaire augmenté de dix pour-cent. Ces indemnités seront payées immédiatement et en espèces.

ARTICLE 72.

L'indemnisation pour la destruction ou la détérioration de biens meubles neutres causées uniquement par l'emploi qui en aura été fait dans un but de guerre sera réglée également d'après les principes établis aux articles 70 et 71

[Translation]

PROPOSAL OF THE DELEGATION OF GERMANY

DRAFT OF A NEW SECTION TO BE ADDED TO THE 1899 REGULATIONS CONCERNING THE LAWS AND CUSTOMS OF WAR ON LAND

SECTION V.—ON THE TREATMENT OF NEUTRAL PERSONS IN THE TERRITORIES OF BELLIGERENT PARTIES

CHAPTER I.—*Definition of a neutral person*

ARTICLE 61.

All the *ressortissants* of a State which is not taking part in a war are considered as neutral persons.

ARTICLE 62.

A violation of neutrality involves loss of character as a neutral person with respect to both belligerents. There is a violation of neutrality:

(a) If the neutral person commits hostile acts against one of the belligerent parties;

(b) If he commits acts in favor of one of the belligerent parties, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties (Article 64, paragraph 2).

ARTICLE 63.

The following acts shall not be considered as committed in favor of one of the belligerent parties in the sense of Article 62, letter b:

(a) Supplies furnished or loans made to one of the belligerent parties, so far as these supplies or loans do not come from enemy territory or territory occupied by the enemy.

(b) Services rendered in matters of police or civil administration.

CHAPTER II.—*Services rendered by Neutral Persons.*

ARTICLE 64.

Belligerent parties shall not ask neutral persons to render them war services, even though voluntary.

The following shall be considered as war services: any assistance by a neutral person in the armed forces of one of the belligerent parties, in the character of combatant or adviser, and, so far as he is placed under the laws, regulations or orders in effect by the said armed force, of other classes also, for example, secretary, servant, cook. Services of an ecclesiastical and sanitary character are excepted.

ARTICLE 65.

Neutral Powers are bound to prohibit their *ressortissants* from engaging to perform military service in the armed force of either of the belligerent parties.

ARTICLE 66.

Neutral persons moreover shall not be required, against their will, to lend services, not considered war services, to the armed forces of either of the belligerent parties.

It will be permitted, nevertheless, to require of them sanitary services or sanitary police services, not connected with actual hostilities. Such services shall be paid for in cash, so far as it is possible to do so. If cash is not paid, requisition receipts shall be given.

CHAPTER III.—*Property of Neutral Persons.*

ARTICLE 67.

No war tax shall be levied on neutral persons. A war tax is deemed to be any requisition levied expressly for a war purpose.

Existing imposts, duties and tolls, or taxes especially levied by one of the belligerent parties, in the enemy territory occupied by it, for the needs of the administration of that territory, are not deemed to be war taxes.

ARTICLE 68.

Neutral property shall not be destroyed, damaged or impaired unless necessary by reason of the exigencies of war. In this case, the belligerent party is only obliged to pay an indemnity in its own country or in the enemy country, when the *ressortissants* of another neutral country or of his own nationals likewise enjoy indemnification and reciprocity is guaranteed.

ARTICLE 69.

The belligerent parties shall make compensation for the use of neutral real property, in the enemy country, the same as in its own country, provided that reciprocity is guaranteed in the neutral State. In no case, however, shall this indemnity exceed that provided by the legislation of the enemy country in case of war.

ARTICLE 70.

Belligerent parties are authorized to expropriate or use for any military purpose, through immediate payment therefor in specie, all neutral movable property found in its country.

They may do the same in enemy country, within the limits and under the conditions specified in Article 52.

ARTICLE 71.

Neutral vessels and their cargoes can be expropriated or used by a belligerent party only if these vessels are used for river navigation within its territory or within the enemy territory.

In case of expropriation the indemnity shall equal the entire valuation of the vessel or of the cargo plus ten per cent. In case of use, it shall equal the ordinary charges plus ten per cent. These indemnities shall be paid immediately and in specie.

ARTICLE 72.

Indemnity for the destruction of neutral personal property, due solely to its use for military purposes, shall likewise be settled in conformity with the principles laid down in Articles 70 and 71.

PROPOSITION DE LA DÉLÉGATION DE LUXEMBOURG.**AMENDEMENT À LA PROPOSITION DE LA DÉLÉGATION DE L'ALLEMAGNE.**

(Deuxième Conférence Internationale de la Paix. Actes et Documents. La Haye, Imprimerie Nationale, 1907, vol. iii, p. 271.)

ARTICLE 70.

Ajouter un alinéa 2, conçu comme suit:

Cette autorisation ne s'étend pas aux moyens de transport public provenant d'Etats neutres appartenant à ces Etats ou à des concessionnaires et reconnaissables comme tels.

PROPOSITION SUBSIDIAIRE DE LA DÉLÉGATION DE LUXEMBOURG.**AMENDEMENT À LA PROPOSITION DE LA DÉLÉGATION DE L'ALLEMAGNE.**

ARTICLE 70.

Ajouter:

"Le maintien des rapports pacifiques et notamment des relations commerciales et industrielles existant entre les habitants des Etats belligérants et les Etats neutres mérite de la part des autorités civiles et militaires une protection particulière.

Lors de l'ouverture des hostilités les belligérants accorderont un délai suffisant pour que le matériel de transport appartenant à des Etats neutres ou à leurs concessionnaires puisse être ramené dans le pays d'origine.

Les réquisitions de matériel de transport appartenant à des États neutres ou à leurs concessionnaires n'auront lieu qu'en cas d'impérieuse nécessité.

La quantité du matériel à réquisitionner, ainsi que son emploi, seront réduits au minimum. Ce matériel sera retourné à bref délai dans son pays d'origine.

Toutes les fois que du matériel de transport public appartenant à un État neutre ou à ses concessionnaires sera réquisitionné par un État belligérant, le matériel de ce dernier ou de ses concessionnaires se trouvant sur territoire neutre, pourra y être également retenu en due compensation."

[Translation.]

PROPOSAL OF THE DELEGATION OF LUXEMBURG.

AMENDMENT TO THE PROPOSAL OF THE DELEGATION OF GERMANY.

ARTICLE 70.

Add a paragraph 2, as follows:

This authorization does not extend to means of public transportation leading from neutral States and belonging to said States or to their grantees, recognizable as such.

SUBSIDIARY PROPOSAL OF THE DELEGATION OF LUXEMBURG.

AMENDMENT TO THE PROPOSAL OF THE DELEGATION OF GERMANY.

ARTICLE 70.

Add:

The maintenance of pacific relations, especially of a commercial and industrial nature, existing between the inhabitants of belligerent and neutral States, merits particular protection on the part of the civil and military authorities.

On the outbreak of hostilities, the belligerents will accord a sufficient delay to enable transportation material belonging to neutral States or to their grantees to be taken back to their country of origin.

Requisitions on means of transportation belonging to neutral States or to their grantees will not be made except in case of imperative necessity.

The amount of material to be requisitioned, as well as its use, will be reduced to a minimum. Such material will be returned, within a short time, to its country of origin.

Whenever public transportation material belonging to a neutral State or to its grantees is requisitioned by a belligerent State, material belonging to the latter or to its grantees found in neutral territory may likewise be held there for proper compensation.

**VŒU NO. 4 OF THE FINAL ACT OF THE SECOND HAGUE PEACE
CONFERENCE OF 1907.**

[Deuxième Conférence Internationale de la Paix. Actes et Documents. La Haye, Imprimerie Nationale, vol. i, p. 700.]

La Conférence émet le vœu que l'élaboration d'un règlement relatif aux lois et coutumes de la guerre maritime figure au programme de la prochaine Conférence et que, dans tous les cas, les Puissances appliquent, autant que possible, à la guerre sur mer, les principes de la Convention relative aux lois et coutumes de la guerre sur terre.

[Translation.]

The Conference utters the vœu that the preparation of regulations relative to the laws and customs of naval war should figure in the programme of the next Conference, and that in any case the Powers may apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land.

TREATY PROVISIONS.¹

TREATY BETWEEN UNITED STATES OF AMERICA AND PRUSSIA.

September 10, 1785.

[Malloy: Treaties, Conventions, etc., vol. 2, p. 1477.]

ARTICLE XVI.

It is agreed that the subjects or citizens of each of the contracting parties, their vessels and effects, shall not be liable to any embargo or detention on the part of the other, for any military expedition, or other public or private purpose whatsoever. And in all cases of seizure, detention, or arrest for debts contracted or offences committed by any citizen or subject of the one party, within the jurisdiction of the other, the same shall be made and prosecuted by order and authority of law only, and according to the regular course of proceedings usual in such cases.

TREATY BETWEEN PRUSSIA AND UNITED STATES OF AMERICA.

July 11, 1799.

[Malloy: Treaties, Conventions, etc., vol. 2, p. 1486.]

ARTICLE XVI.

In times of war, or in cases of urgent necessity, when either of the contracting parties shall be obliged to lay a general embargo, either in all its ports, or in certain particular places, the vessels of the other party shall be subject to this measure, upon the same footing as those of the most favoured nations, but without having the right to claim the exemption in their favour stipulated in the sixteenth article of the former treaty of 1785. But on the other hand, the proprietors of the vessels which shall have been detained, whether for some military expedition, or for what other use soever, shall obtain from the Government that shall have employed them an equitable indemnity, as well for the freight as for the loss occasioned by the delay. And furthermore, in all cases of seizure, detention, or arrest, for debts contracted or offences committed by any citizen or subject of the one party within the jurisdiction of the other, the same shall be made and prosecuted by order and authority of law only, and according to the regular course of proceedings usual in such cases.

¹ See also similar provisions in the treaties cited by Bonfils and Calvo, *ante*, pp. 73, 75.

TREATY BETWEEN UNITED STATES AND PRUSSIA.

May 1, 1828.

[Malloy: Treaties, Conventions, etc., vol. 2, p. 1496.]

ARTICLE XII.

The twelfth article of the treaty of amity and commerce, concluded between the parties in 1785, and the articles from the thirteenth to the twenty-fourth, inclusive, of that which was concluded at Berlin in 1799, with the exception of the last paragraph in the nineteenth article, relating to treaties with Great Britain, are hereby revived with the same force and virtue as if they made part of the context of the present treaty, it being, however, understood that the stipulations contained in the articles thus revived shall be always considered as in no manner affecting the treaties or conventions concluded by either party with other Powers, during the interval between the expiration of the said treaty of 1799, and the commencement of the operation of the present treaty.

The parties being still desirous, in conformity with their intention declared in the twelfth article of the said treaty of 1799, to establish between themselves, or in concert with other maritime Powers, further provisions to ensure just protection and freedom to neutral navigation and commerce, and which may, at the same time, advance the cause of civilization and humanity, engage again to treat on this subject at some future and convenient period.

TREATY BETWEEN UNITED STATES AND TURKEY.

May 7, 1830.

[Malloy: Treaties, Conventions, etc., vol. 2, p. 1318.]

ARTICLE VIII.

Merchant vessels of the two contracting Parties shall not be forcibly taken, for the shipment of troops, munitions and other objects of war, if the captains or proprietors of the vessels, shall be unwilling to freight them.¹

TREATY BETWEEN FRANCE AND THE DOMINICAN REPUBLIC.

November 26, 1852.

[British and Foreign State Papers, vol. 41, p. 908.]

IV. Les citoyens de l'un et de l'autre Etat ne pourront être respectivement soumis à aucun embargo, ni retenus avec leurs navires, cargaisons, marchandises ou effets pour une expédition militaire quelconque, ni pour quelque usage public que ce soit, sans une in-

¹ Translation.

demnité débattue et fixée préalablement par les parties intéressées et suffisante pour cet usage, et les torts, pertes, retards et dommages qui dépendent ou qui naîtront du service auquel ils seront obligés.

TREATY BETWEEN THE NETHERLANDS AND GUATEMALA.

March 22, 1856.

[British and Foreign State Papers, vol. 56, p. 598.]

X. The citizens and subjects of the respective States cannot be subjected to any embargo nor be detained with their ships, crews, cargoes, or goods for any warlike expedition whatever, nor for any public or private use, without immediate and complete indemnification to those interested, for such use and for the damage and injury, unless quite accidental, caused by such compelled service.¹

TREATY BETWEEN PRUSSIA, ETC., AND SPAIN.

March 30, 1868.

[British and Foreign State Papers, vol. 58, p. 23.]

V. Les sujets de chacune des Parties Contractantes seront exempts, dans le territoire de l'autre Partie, de tout service personnel dans l'armée, la marine, et la milice nationale, de toutes charges de guerre, emprunts forcés, réquisitions et contributions militaires de quelque espèce que ce soit. Leurs propriétés ne peuvent être séquestrées, ni leurs navires, cargaisons, marchandises ou effets être retenus pour un usage public quelconque, sans qu'il leur soit accordé préalablement un dédommagement à concerter entre les parties intéressées sur des bases justes et équitables.

TREATY BETWEEN PRUSSIA, IN THE NAME OF THE NORTH GERMAN CONFEDERATION AND THE ZOLL-VEREIN, AND MEXICO.

August 28, 1869.

[British and Foreign State Papers, vol. 68, p. 1055.]

XIII. The subjects of each of the Contracting States shall be respectively exempt from obligatory military service in the army and navy, and in the militia or national guard. They shall not be subject to any other imposts, taxes, or charges than those paid by the citizens of the country in which they reside. Neither shall their vessels, crews, merchandise or other property be detained for any military expedition, nor any other kind of public service whatever, without a corresponding compensation.¹

¹ Translation.

TREATY BETWEEN PRUSSIA, IN THE NAME OF THE
NORTH GERMAN CONFEDERATION AND OF THE ZOLL-
VEREIN, AND SALVADOR.

June 13, 1870.

[British and Foreign State Papers, vol. 63, p. 607.]

VI. The citizens or subjects of each country cannot respectively be subjected to any embargo, nor can they be detained with their vessels, cargoes, merchandise, and effects for any military expedition, nor for any public use, unless there has been previously fixed by the interested parties themselves or by experts on their behalf, a sufficient indemnification in all cases, according to usage, both for the service imposed upon them, and for the damages, losses, and delays occasioned thereby or resulting therefrom.¹

TREATY BETWEEN GERMANY AND PORTUGAL.

March 2, 1872.

[British and Foreign State Papers, vol. 62, p. 43.]

II. Les sujets de chacune des Parties Contractantes seront exempts dans le territoire de l'autre Partie de tout service personnel dans l'armée, la marine, et la milice nationale, de tous charges de guerre, emprunts forcés, réquisitions et contributions militaires de quelque espèce que ce soit. Leurs propriétés ne pourront être séquestrées, ni leurs navires, cargaisons, marchandises ou effets être retenus pour un usage public quelconque, sans qu'il leur soit accordé préalablement un dédommagement à concertier entre les parties intéressées sur des bases justes et équitables.

TREATY BETWEEN GERMANY AND COSTA RICA.

May 18, 1875.

[British and Foreign State Papers, vol. 67, p. 1274.]

VII. The citizens of one or the other country shall not be subjected to any embargo, or be detained with their vessels, crews, cargoes, merchandises, and goods for any military expedition, or any other public use, without there being fixed previously by the interested parties or experts appointed by them, a just and sufficient indemnification, in all the cases, to repay all the injuries, losses, delays, and damages that may be occasioned by the service to which they may be submitted, or which may result therefrom.¹

¹ Translation.

TREATY BETWEEN GERMANY AND THE KINGDOM OF
THE HAWAIIAN ISLANDS.

March 25, 1879.

[British and Foreign State Papers, vol. 71, p. 579.]

II. * * * They shall not be subject to any embargo, nor be detained with their vessels, crews, cargoes, or commercial effects, to be used for any military expedition whatever, or for any public or private service whatever, unless the Government or local authority shall have previously agreed with the parties interested on the indemnity to be granted for such service and for such compensation as may fairly be required for the injury, which (not being purely fortuitous) may grow out of the service, which they have voluntarily undertaken.¹

TREATY BETWEEN FRANCE AND THE DOMINICAN
REPUBLIC.

September 9, 1882.

[British and Foreign State Papers, vol. 73, p. 565.]

VIII. Les navires, cargaisons, marchandises, ou effets appartenant à des citoyens de l'un ou de l'autre Etat, ne pourront être respectivement soumis à aucun embargo, ni retenus pour une expédition militaire quelconque ni pour quelque usage public que ce soit, sans une indemnité préalablement débattue par les parties intéressées, fixée et acquittée, suffisante pour compenser les pertes, dommages, et retards qui seraient la conséquence du service auquel ils auraient été astreints.

TREATY BETWEEN GERMANY AND THE DOMINICAN
REPUBLIC.

January 30, 1885.

[British and Foreign State Papers, vol. 76, p. 127.]

VIII. It shall not be lawful to lay any embargo on ships, cargoes, goods, or effects belonging to Germans in the Dominican Republic or to Dominicans in Germany, nor to retain the same for military undertakings, or for any other purpose whatever, without giving the parties interested a compensation to be agreed upon beforehand, the amount of which must be sufficient to cover all the injury, loss, delay, or prejudice which may have been caused by such measures.¹

¹ Translation.

TREATY BETWEEN FRANCE AND THE UNITED STATES
OF MEXICO.

November 27, 1886.

[British and Foreign State Papers, vol. 77, p. 1093.]

VIII. Les navires, cargaisons, marchandises, ou effets appartenant à des citoyens de l'un ou de l'autre État ne pourront être respectivement soumis à aucun embargo ni retenus pour une expédition militaire quelconque, ni pour quelque usage public que ce soit, sans une indemnité préalablement débattue par les parties intéressées, fixée et acquittée, suffisante pour compenser les pertes, dommages, et retards qui seraient la conséquence du service auquel ils auraient été astreints.

TREATY AND CONSULAR CONVENTION BETWEEN
GERMANY AND GUATEMALA.

September 20, 1887.

[British and Foreign State Papers, vol. 79, p. 738.]

VII. The vessels, cargoes, merchandize, and effects of the citizens of one or the other country shall not be subject to any embargo nor detention for any military expedition whatsoever, nor any public use, without the interested parties, or arbitrators named by them, having previously determined a just and sufficient indemnification in all cases and for all prejudices, losses, delays, and damages occasioned by or resulting from such service.¹

TREATY AND CONSULAR CONVENTION BETWEEN GER-
MANY AND HONDURAS.

December 12, 1887

[British and Foreign State Papers, vol. 79, p. 1152.]

VII. The vessels, cargoes, merchandize, and effects of the citizens of one or the other country shall not be subject to any embargo nor detention for any military expedition whatsoever, nor any public use, without the interested parties, or arbitrators named by them, having previously determined a just and sufficient indemnification in all cases and for all prejudices, losses, delays, and damages occasioned by or resulting from such service.¹

¹ Translation.

TREATY BETWEEN GERMANY AND THE REPUBLIC OF COLOMBIA.

July 23, 1892.

[British and Foreign State Papers, vol. 84, p. 139.]

VII. The people of each of the Contracting States shall be exempt from extraordinary war contributions, forced loans, military requisitions, and from military and political services of every kind, in the territory of the other. Nor may their ships, cargoes, goods, and other property be embargoed or retained extrajudicially for military expeditions or for any other purposes. In case such a measure is unavoidable, just indemnity shall be granted them, and, if the measure be taken in time of peace, this indemnity shall be agreed upon with them beforehand. Moreover, they shall in all cases, as regards their real and personal property, be subjected to no other burdens, duties, and imposts than those levied upon the natives and the subjects of the most favoured nation.¹

TREATY AND CONSULAR CONVENTION BETWEEN GERMANY AND NICARAGUA.

February 4, 1896.

[British and Foreign State Papers, vol. 97, p. 994.]

VII. The ships, cargoes, and effects of subjects of both countries respectively cannot be embargoed or detained for the purposes of any military expedition whatever or for any public object unless equitable compensation has been agreed upon beforehand by the parties themselves or by means of experts, which shall in all cases be sufficient to cover all injuries, losses, delays, and damages which are or may be caused by the services imposed.¹

¹ Translation.

**BRITISH MANUAL OF MILITARY LAW, WAR OFFICE,
1914, P. 313.**

(X) NEUTRAL RAILWAY MATERIAL.

507. Railway material originating from neutral territory, whether it be the property of the neutral Government, companies, or private persons, provided it is recognizable as belonging to them, must not be requisitioned or utilized except in so far as it is absolutely necessary. It must be sent back to the country of origin as soon as possible.¹

508. If railway material is thus detained, the neutral Power may likewise, in case of necessity, keep and utilize a corresponding amount of material originating from the territory of the belligerent Power.²

509. The retention of this material by the neutral Power must not assume the character of retaliation. The right must be exercised only in case of necessity, up to the due amount, and with strict impartiality between the two belligerents.

510. Compensation must be paid on either side according to the amount of material retained and the length of time it was retained.³

¹ Neutrality Convention, Art. 19.

² Hague Conference, 1907. *Actes*, Vol. I, p. 58.

³ Neutrality Convention, Art. 19, par. 3.

**DIPLOMATIC CORRESPONDENCE RESPECTING THE
SINKING OF SIX BRITISH VESSELS IN THE SEINE
BY PRUSSIAN TROOPS, 1870, 1871.**

[NOTE.—The complete correspondence as published by the British Government may be found in British and Foreign State Papers, vol. 61, pp. 575–612.]

[British and Foreign State Papers, vol. 61, pp. 579, 580.]

No. 12.—Mr. Odo Russell to Earl Granville. (Rec. January 13.)

VERSAILLES, *January 8, 1871.*

MY LORD,

After receiving this morning your Lordship's telegram of yesterday afternoon, I called on Count Bismarck and again talked over the question of the 6 English colliers shot at and sunk by the Prussian authorities at Duclair.

His Excellency said that he had not yet received a circumstantial account of the transaction, but he found that the law officers held that a belligerent had a full right, in self-defence, to the seizure of neutral vessels in the rivers or inland waters of the other belligerent, and that compensation to the owners was due by the vanquished Power, not by the victors.

If conquering belligerents admitted the right of foreigners and neutrals to compensation for the destruction of their property in the invaded State they would open the door to new and inadmissible principles in warfare. Claims for indemnity were submitted to him daily by neutrals holding property in France which he could never admit. He valued, however, the friendship and good-will of England too highly to accept this interpretation of the law in the present case, and preferred to adopt one that would meet the wishes of Her Majesty's Government and give full satisfaction to the people of England.

He deplored the treatment to which the masters and crews of the colliers had been subjected, according to the accounts he had read in the newspapers, and begged I would assure your Lordship, with expressions of deep regret, that when the Reports from the Prussian authorities had been received he would obtain the King's permission to pay any just compensation to the owners and sufferers your Lordship might think right to recommend.

I Have, &c.,

Earl Granville.

ODO RUSSELL.

No. 14.—Count Bismarck to Count Bernstorff. (Communicated to Earl Granville by Count Bernstorff, February 1.)

[Translation.]

VERSAILLES, *January 25, 1871.*

I do myself the honour of transmitting to your Excellency, in pursuance of my preliminary communication of the 4th, and my telegram of the 8th instant, a copy of the Report from the 1st Army

Corps on the sinking of English ships in the Seine, near Duclair—the preparation of which has been delayed by the manifold movements of the Corps concerned. Your Excellency will find therein, with the same satisfaction as myself, that the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usages. The Report shows that a pressing danger was at hand, and every other means of averting it was wanting; the case was, therefore, one of necessity which, even in time of peace, may render the employment or destruction of foreign property admissible, under reservation of indemnification. I take the opportunity of calling to mind that a similar right in time of war has become a peculiar institute of law, the *ius angariae*, which so high an authority as Sir Robert Phillimore defines thus: that a belligerent Power demands and makes use of foreign ships, even such as are not in inland waters, but in ports and roadsteads within its jurisdiction, and even compels the crews to transport troops, ammunition, or implements of warfare. I hope the negotiation with the owners, for which you are already authorized, will lead to an understanding as to the indemnification for the damage; if not, it would have to be submitted to an arbitrator's award. In the negotiation, also, the difference in the statements of the 1st Army Corps and of the English Consul at Dieppe, as to the number of English vessels sunk will be explained.

I respectfully request your Excellency to communicate this despatch, with its inclosure, to the Secretary of State of Her Britannic Majesty, and to be so good as to express, at the same time, my apology for the delay, as well as my thanks to Her Majesty's Government for the just appreciation of the military necessity with which Lord Granville has apprehended and treated this matter.

Count Bernstorff.

BISMARCK.

(Inclosure.)—*Report of the 1st Army Corps on the Sinking of Ships off Duclair.*

[Translation.]

The 1st Army Corps having received orders to occupy Rouen with three infantry brigades (one was left at Amiens), and to secure itself in proper positions in advance on both banks of the Seine against an enemy who was known to be numerically stronger than the Army Corps, the attention of the General in command was the more necessarily directed first of all to the Seine itself, as information had been received that French men-of-war had but a short time before left the port of Rouen.

A close examination of the Seine was therefore ordered; and soundings taken by engineer officers showed that the channel was from 30 to 35 feet deep throughout, and the depth was increased from 4 to 10 feet by the tide.

Several French men-of-war also soon appeared, and steamed with the rising tide as far as off Duclair; they returned with the ebb to Candebeac, where most of them remained for the night. Our patrols, where they showed themselves, were hotly fired upon by the men-of-war; hostile detachments were even disembarked on

the left bank of the Seine. It is clear that the troops were thereby really endangered in their positions and operations.

It was not only possible for the enemy to flank an advance of our troops on the right or left bank by a direct artillery fire, but a change from one bank to the other was extraordinarily facilitated for the hostile troops—nay, they might even be disembarked in the rear of ours.

According to the statement of competent judges, a large wooden ship, which was stationed in the Seine with two or three small ships, alone held 1,000 troops for landing.

Another considerable evil was that the men-of-war entirely stopped the road to Candebec, as it runs close to the bank at the foot of the steep rocky cliffs.

Finally, the appearance of the men-of-war kept the inhabitants of Rouen in continual excitement, which was the more to be avoided, as the quartering of troops, the closing of the manufactories, &c., already made the temper of the workmen worse from day to day.

Under these circumstances, General von Bentheim ordered Lieutenant-Colonel von der Burg, Chief of the General Staff, to have the Seine completely blocked up. Fresh examinations and conferences with the first Engineer Officer, Major Fahland, gave the following result:—

It is impossible to block up the channel completely by means of the low river ships; this can only be effected by sinking high-built sea ships. The great expense of attaining the end in this manner makes it appear desirable to attempt the blocking up in another and less costly manner, for example:—

1. By the formation of batteries which were made near La Fontaine.

2. By torpedoes.

The first measure proved insufficient, as it was soon ascertained that some of the small steamers were armour-plated, and the Commander had only field artillery at his disposal; the second failed from the want of the requisite materials at the time.

Therefore the only possible means of blocking up the channel was by the sinking of sea ships. So Lieutenant-Colonel von der Burg ordered Major Fahland to seize all the sea ships which were off Duclair. This measure was necessary, because if a requisition had been made for ships to the mayoralty here, probably all the ships, timely warned, would have gone to Havre.

All the ships seized immediately hoisted neutral flags, especially English. In the urgency of the matter, researches could not then be made how far the neutral flag covers ships also in rivers, and lying especially between belligerent parties: the suitable ships were pointed out for sinking.

The work began on the 19th December; altogether 11 ships were sunk, amongst them 7 English ones.

It is hardly worth mentioning that the reports of some French newspapers, stating that the British crews were brutally treated, are quite unfounded. As only three ships were sunk daily there was time enough to warn the crews to save their papers and effects, which was done. Besides, an order was handed to the captains in which the

value of the ship, according to the captain's own statement, was entered.

Finally, it must also be mentioned that, in order to spare the ships as much as possible, the ballast-ports only were a little enlarged. Therefore, if they have not been tossed about, and damaged by the ebb and flow in the bed of the Seine, it appears not unlikely that after they are raised they may again be fit for use.

For the General in Command,

VON BENTHEIM,

Lieutenant-General and Commander of Division.

**GREAT BRITAIN: KING'S REGULATIONS AND
ADMIRALTY INSTRUCTIONS, 1913.**

ARTICLE 494.

If any British merchant ship, the nationality of which is unquestioned, should be coerced into the conveyance of troops or into taking part in other hostile acts, the Senior Naval Officer, should there be no diplomatic or consular authority at the place, is to remonstrate with the local authorities and take such other steps to assure her release or exemption, as the case may demand, and as may be in accordance with these Regulations.

U. S. NAVAL WAR CODE OF 1900.

[Naval War College: International Law Discussions, 1903 (Washington, 1904), p. 36.]

ARTICLE 6.

If military necessity should require it, neutral vessels found within the limits of belligerent authority may be seized and destroyed or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon these matters.

Could a fast pleasure yacht be seized and used for a dispatch boat under the provisions of Article 6?

"Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war and which are lawful according to the modern law and usages of war." (Instructions for the Government of Armies of the United States, Article 14; Naval War Code, Article 3.)

If military necessity exists, the fast pleasure yacht could be seized and used for a dispatch boat without question. A fast pleasure yacht is properly included under the clause "neutral vessels."

KRIEGSBRAUCH IM LANDKRIEGE.

Berlin, 1902.

[No. 31, pp. 73-75.]

The following rights correspond to the duties of neutral States:

1. * * *
2. * * *
3. * * *
4. * * *

5. The property of the neutral State, as also that of its citizens, is, even when situated within the war zone, to be respected so far as the necessity of war permits. It may, of course, be seized under circumstances, by the belligerent parties; it may even be destroyed, but only upon the condition that full compensation be made subsequent to the owners who have suffered damages. Thus, to make this matter clear by an example from the year 1870, the seizure and sinking of six English colliers near Duclair was a necessity justified, to be sure, on military grounds, but it was nevertheless a forcible violation of English property, for which the English Government demanded indemnification, which was readily consented to on the part of Germany.

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